Supreme Court, U.S.
FILED
94 179 JUL 28 1994
OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC.,
CENTRAL TRANSPORT, INC.,
AND
CENTRAL CARTAGE COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PATRICK A. MORAN*
SCOTT T. STIRLING
2500 Buhl Building
Detroit, MI 48226
(313) 963-9625
ATTORNEYS FOR PETITIONERS
**Counsel of Record*

---

121 pp

QUESTION PRESENTED

WHETHER A CORPORATE DEFENDANT SHOULD BE FORECLOSED FROM A REHEARING BEFORE THE COURT OF APPEALS TO PRESENT AND DEVELOP EVIDENCE DISCOVERED AFTER THE CLOSE OF ADMINISTRATIVE HEARINGS WHICH COULD LEAD TO A FINDING OF MISCONDUCT OR OVERZEALOUSNESS BY A GOVERNMENT ATTORNEY IN BREACH OF THE HIGH STANDARD OF DISCLOSURE FOR GOVERNMENT ATTORNEYS MERELY BECAUSE THE PENALTIES FOR SUCH BREACH ARE CIVIL IN NATURE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
REASON FOR GRANTING CERTIORARI	6
A WRIT SHOULD BE GRANTED TO GIVE THE COURTS OF APPEAL DIRECTION CONCERNING WHETHER *BRADY* PRINCIPLES ASSURING FAIR PLAY BY GOVERNMENT ATTORNEYS SHOULD BE APPLIED TO CIVIL ADMINISTRATIVE PROCEEDINGS WHICH BY THEIR VERY NATURE RELY UPON VOLUNTARY DISCLOSURE BY THE GOVERNMENT ATTORNEY	6
A. The Sixth Circuit Strained To Find That Civil Penalties Were "Quasi-Criminal" In A Contemporaneous Case To Apply Brady Principles To That Civil Action, Yet Denied The Application Of Brady Principles In This Civil Action Despite The Lack Of A Real Distinction Between The Cases	6
B. Attorneys Representing The National Labor Relations Board Are Charged With A Higher Standard Of Disclosure And Conduct Than Are Private Lawyers	8
1. Attorneys For Agencies Of The United States Government Are Held To A Higher Standard Of Conduct Than Are Private Lawyers	8

Page

2. The National Labor Relations Board Holds Its Lawyers To A Higher Standard Of Conduct Than Private Lawyers Under The Code Of Federal Regulations 11

C. The Format Of The Proceedings Before The National Labor Relations Board Mandate That The Board Itself Maintain A Heightened Awareness Of The Necessity For Self-Policing 13

1. The Absence Of Prehearing Discovery In National Labor Relations Board Administrative Hearings Creates An Opportunity For Abuse By Overzealous Counsel For the National Labor Relations Board 13

2. Refusal Of The National Labor Relations Board To Investigate Whether Its Own Counsel Acted Improperly Effectively Forecloses Any Opportunity For The Correction Of Abuse By Overzealous Government Counsel 17

3. This Case Gives The Court An Opportunity To Decide Whether A Suggestion Of Overzealous Activities By A Government Civil Lawyer Constitutes An Extraordinary Circumstance Mandating Reconsideration Of A Decision By The National Labor Relations Board 23

CONCLUSION 24

APPENDIX ..... ia

TABLE OF AUTHORITIES

Cases:	Page
Berger v. United States, 295 U.S. 78 (1935)	10, 13
Brady v. Maryland, 373 U.S. 83 (1963)	6
Braun v. Harris, [1979-80 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶17,070 (E.D. Wis. 1980)	9
Central States Southeast and Southwest Areas Pension Fund v. Rogers, No. 92-2435 (6th Cir. December 16, 1993)	22
D&S Leasing, Inc., 299 NLRB 658 (1990)	4
Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), *petition for cert. filed* May, 1994	6, 7, 8, 13, 24
Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)	17, 18
Douglas v. Donovan, 704 F.2d 1276 (D.C. Cir. 1983)	9
Drukker Communications, Inc. v. NLRB, 700 F.2d 727 (D.C. Cir. 1983)	10
EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	17
Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992)	8, 9, 10
Frilette v. Kimberlin, 508 F.2d 205 (3d Cir. 1974) (*en banc*) *cert. denied* 421 U.S. 980 (1975)	14
Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390 (5th Cir. 1983)	18
Labor Board v. Cheney Lumber Co., 327 U.S. 385 (1945)	17
Labor Board v. Jones & Laughlin Co., 331 U.S. 416 (1946)	18
Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, 276 NLRB 276 (1985)	12
Marshall Field & Co. v. Board, 318 U.S. 253 (1942)	17

Cases: Page

NLRB v. Advanced Systems Inc., 681 F.2d 570 (9th Cir. 1982) 18

NLRB v. CenTra, Inc., 954 F.2d 366 (6th Cir. 1992) 5, 22

NLRB v. Central Mercedita, Inc., 273 F.2d 370 (1st Cir. 1959) 18

NLRB v. Ferraro's Bakery, Inc., 353 F.2d 366 (6th Cir. 1965) 18

NLRB v. Good Foods Mfg. & P. Corp., 492 F.2d 1302 (7th Cir. 1974) 18

NLRB v. International Woodworkers, 238 F.2d 378 (9th Cir. 1956), *cert. denied* 361 U.S. 816 (1959) 18

NLRB v. Local Union No. 74 Int. Ass'n of Marble, Slate, Etc., 471 F.2d 43 (7th Cir. 1972) 18

NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978 (2d Cir. 1974) (per curium)..... 14

NLRB v. Marshall Maintenance Corp., 320 F.2d 641 (3d Cir. 1963) 18

NLRB v. Nueva Engineering, Inc., 761 F.2d 961 (4th Cir. 1985) 14

NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318 (1961) ... 17

NLRB v. Robin American Corp., 667 F.2d 1170 (5th Cir. 1982) 18

NLRB v. Washington Heights-West Harlem-Inwood Mental Health Counsel, Inc., 897 F.2d 1238 (2d Cir. 1990) ... 14

NLRB v. Wayne Transp., 776 F.2d 745 (7th Cir. 1985) 18

North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968) 14

Olmstead v. United States, 277 U.S. 438 (1927) 13

Silverman v. Ehrlich Beer Corp., 687 F. Supp. 67 (S.D.N.Y. 1987) 12

United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993) 9, 11

Cases:

United States v. Witmer, 835 F. Supp. 208 (M.D. Pa. 1993) .....

Williams v. Sullivan, 779 F. Supp. 471 (W.D. Mo. 1991) .....

Statutes

28 U.S.C. § 1254(1) .....

29 U.S.C. § 160(e) .....

Regulations

29 C.F.R. § 100.101 .....

29 C.F.R. § 100.111 .....

Miscellaneous

Schnapper, *Legal Ethics and the Government Lawyer*, 32 Rec. A.B.N.Y. 649 (1977) .....

Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 Iowa L. Rev. 807 (1966) .....

Wellman, *The Art of Cross Examination* (4th Ed. 1992) .....

BEST AV

CenTra, Inc., Central Transport, Inc. and Central Cartage Co. (collectively "CenTra") respectfully petition this Court to issue a Writ of Certiorari to review the denial of CenTra's Petition for Rehearing and Suggestion for Rehearing *En Banc* by the United States Court of Appeals for the Sixth Circuit entered on April 29, 1994.

OPINIONS BELOW

The opinions of the Administrative Law Judge and the National Labor Relations Board (the "Board") are set forth in Appendices A and B. The opinion of the Sixth Circuit Court of Appeals enforcing the Board's determination is set forth in Appendix C. The opinion of the Sixth Circuit Court of Appeals denying CenTra's Motion to Set Aside Settlement, To Set Aside Order of Enforcement and to Grant Rehearing on the Issue of Determination of Joint Employer Status is set forth in Appendix D. The denial of CenTra's Petition for Rehearing and Suggestion for Rehearing *En Banc* is set forth in Appendix E.

JURISDICTION

The judgment of the Court of Appeals below was entered on February 18, 1994. (App. D). A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on April 29, 1994. (App. E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, 29 U.S.C. § 160(e), is set forth in Appendix F.

STATEMENT OF THE CASE

The National Labor Relations Board is entrusted with the authority to bring actions against employers who violate the National Labor Relations Act (the "Act"), 29 U.S.C. § 141 et seq. The Board's General Counsel's Office prosecutes alleged violations

VAILABLE COPY

of the Act while Administrative Law Judges act as the fact finders. Appeal of the Administrative Law Judge's decision may be reviewed by the Board itself. Enforcement of the Board's determinations is made by the Circuit Courts of Appeal, which, absent extraordinary circumstances, will only consider matters which were also presented to the Board below.

A single employee may be simultaneously employed by two or more employers under the Act. A finding of joint employer status is accomplished by proving that one company was the employer and then proving that another company acted in a manner that would indicate that it is also the employer. That inquiry is based upon a finding of facts which in turn depends in great measure upon testimony of witnesses in a position to know the operation of the work place and the intent of the parties.

On June 10, 1981, D&S Leasing, Inc. ("D&S Leasing") and Central Transport, Inc. ("Central Transport") entered into an Agreement to Provide Temporary Employees ("Employment Agreement") pursuant to which D&S Leasing supplied workers to Central Transport to perform work on behalf of Central Transport at Central Cartage Co.'s ("Central Cartage") terminal facility in Cleveland, Ohio ("Cleveland Operation"). Both Central Transport and Central Cartage are involved in interstate commerce. They will be collectively referred to hereinafter as CenTra, which is also the name of their common 100% shareholder.

Charles L. Garavaglia ("Garavaglia"), Vice-President of Labor Relations of Central Cartage and Central Transport, participated in the negotiations of the Employment Agreement in behalf of CenTra. George W. Rogers, the stockholder of record of 100% of the stock of D&S Leasing represented D&S Leasing in those negotiations.

In June 1986, CenTra terminated the Employment Agreement with D&S Leasing in accordance with its rights under that Agreement. As a result, the employees of D&S Leasing that had been leased to CenTra were laid off. CenTra hired some but not all of those workers as employees of CenTra. CenTra continued to

provide the same service to its customers following the termination of the Employment Agreement.

In June 1986, unfair labor practice charges were filed against CenTra, alleging that the workers under the Employment Agreement were at all times the employees of CenTra and that CenTra had violated the Act by failing to bargain with the union concerning CenTra's decision to terminate the services of some of those workers.

In April 1986, CenTra had terminated the employment services of Garavaglia, but began discussions with Garavaglia that led to CenTra retaining Garavaglia's new company, C&G Consultants as the labor consultant to CenTra on July 1, 1986.

On March 23 through March 27, 1987, an evidentiary hearing was held before Administrative Law Judge Donald R. Holley to determine whether: (1) CenTra and D&S Leasing were joint employers; (2) CenTra's failure to bargain was a violation of the Act; and (3) CenTra's actions were "inherently destructive" of rights guaranteed by the Act.

At the very opening of those proceedings, the attorney for the Board, Paul Lund ("Government Attorney Lund"), announced to the Administrative Law Judge ("ALJ") that he would not be asserting liability against D&S Leasing, the direct employer of the workers and the alleged joint employer with CenTra. That announcement was a total surprise to CenTra and its counsel.

Government Attorney Lund's first witness was Garavaglia, who testified that he had served as Vice-President of Labor Relations for both Central Cartage and Central Transport until April 1986, shortly before the violations under the Act allegedly occurred. Garavaglia testified that CenTra exercised a great deal of control over the actions and duties of the D&S Leasing personnel. Garavaglia also testified that CenTra controlled D&S Leasing's employees' work assignments, set their work schedules, approved or disapproved vacation requests and documented the employees' work performance and rules violations. He also stated that he had frequently admonished CenTra's managers that they could not treat D&S Leasing's employees as their own.

However, Garavaglia stated that CenTra continued to maintain direct control over the dock workers and disciplined or terminated workers without consulting with D&S Leasing. Garavaglia further stated that, as an agent for CenTra, he attended contract negotiation sessions and was given a copy of the agreement for review and approval before the contract between D&S Leasing and its employees was signed.

During cross-examination by Timothy Carroll, CenTra's attorney, Garavaglia denied that he had ever made statements or provided affidavits of any nature to any representative of the Board. Government Attorney Lund did not advise the ALJ or CenTra to the contrary. Garavaglia's testimony had been damaging, however, because Garavaglia had been a CenTra executive and was serving as a labor consultant to CenTra at the time of the hearing, Mr. Carroll had no reason to question Garavaglia's word.

Unbeknownst to CenTra, Garavaglia's company, C&G Consultants, was serving as the labor representative of D&S Leasing at the same time it was performing those functions for CenTra. C&G Consultants was also providing advice on labor issues to companies which hired the services of D&S Leasing. Furthermore, Garavaglia and D&S Leasing had entered into several joint business ventures.

On August 31, 1987, the ALJ determined that CenTra (and Central Transport and Central Cartage) was a joint employer with D&S Leasing and that CenTra had committed violations under Sections 8(a)(1), (3), and (5) of the Act. In reaching these conclusions, the ALJ relied heavily on the testimony of Garavaglia.

The Board adopted the ALJ's findings and issued an Order of Reinstatement and Backpay on August 31, 1990. *D&S Leasing, Inc.*, 299 NLRB 658 (Aug. 31, 1990) (App. B). Additionally, the Board concluded that CenTra's conduct constituted anti-union animus under Section 8(a)(1) and (3) in light of the ALJ's determination as to Garavaglia's testimony. The Board then filed a Petition for Enforcement of its decision.

On January 17, 1992, the Sixth Circuit granted enforcement rights in favor of the Board to collect employee wages and benefits including pension payments from CenTra for payment to certain employees that the Board had found to be jointly employed by CenTra and D&S Leasing. *National Labor Relations Board v. CenTra, Inc.*, 954 F.2d 366 (6th Cir. 1992). (App. C). The Court stated that the joint employer issue was waived because CenTra did not appeal the Board's determination that CenTra had jointly employed the D&S Leasing employees.

However, after the Court's opinion, CenTra discovered new evidence impacting Garavaglia's credibility. In May 1993, CenTra learned for the first time of Garavaglia's financial interest in D&S Leasing. Based on this information, CenTra filed a Petition for Hearing *De Novo* or in the Alternative to Reopen the Record to Consider Additional Evidence on May 27, 1993. In its opinion dated September 23, 1993, the Board declined to consider the recently discovered information, holding that the decision of the Sixth Circuit enforcing its order stripped the Board of jurisdiction over the matter.

CenTra filed an Application for Stay of the Backpay Hearing on September 24, 1993, with the Sixth Circuit. The Court denied the Application for Stay and the hearing concerning backpay was held on September 27, 1993. During the course of that hearing, a settlement agreement was reached between counsel. At the time of that settlement agreement, the activities of Garavaglia and possible complicity of Government Attorney Lund had not been determined.

Thereafter, CenTra received information that Garavaglia had met with the Board's counsel and had agreed to aid their case in return for the release of liability of D&S Leasing and had received a subpoena prior to the ALJ hearing to hide his complicity and further catch CenTra by surprise. On January 5, 1994, with an understanding of the facts of Garavaglia's and D&S Leasing's complicity with the Board counsel, CenTra filed a Motion to Set Aside Settlement, To Set Aside Order of Enforcement and to Grant Rehearing on the Issue of Determination of Joint Employer Status ("Motion to Set Aside Settlement").

On February 18, 1994, the Motion to Set Aside Settlement was denied. CenTra then filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc*. The Court denied the petition on April 29, 1994.

REASON FOR GRANTING CERTIORARI

A WRIT SHOULD BE GRANTED TO GIVE THE COURTS OF APPEAL DIRECTION CONCERNING WHETHER *BRADY** PRINCIPLES ASSURING FAIR PLAY BY GOVERNMENT ATTORNEYS SHOULD BE APPLIED TO CIVIL ADMINISTRATIVE PROCEEDINGS WHICH BY THEIR VERY NATURE RELY UPON VOLUNTARY DISCLOSURE BY THE GOVERNMENT ATTORNEY

A. The Sixth Circuit Strained To Find That Civil Penalties Were "Quasi-Criminal" In A Contemporaneous Case To Apply *Brady* Principles To That Civil Action, Yet Denied The Application Of *Brady* Principles In This Civil Action Despite The Lack Of A Real Distinction Between The Cases.

The Court of Appeals for the Sixth Circuit recently found that civil government attorneys ("Government Attorneys") have a heightened standard of disclosure to the court and opposing counsel in denaturalization and extradition proceedings. However, the same Court denied CenTra's Petition for Rehearing and Suggestion for Rehearing *En Banc* which claimed similarly that civil Government Attorneys have a heightened standard of disclosure in administrative proceedings which resulted in a multi-million dollar judgment. The difference between the cases is without substantive distinction — CenTra should have received relief in the Court of Appeals.

The Sixth Circuit in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) reconsidered its own order of extradition rendered years earlier. It then reversed its prior judgment by finding that the civil penalty of extradition was in fact "quasi-criminal" in

---

Brady v. Maryland, 373 U.S. 83 (1963).

nature because the extradition of an alleged Nazi war criminal to Israel to stand trial was akin to a criminal death penalty.

The Court held the Government Attorneys of the Office of Special Investigations unit ("OSI") had breached their duty to disclose exculpatory information to the courts and to the opposing litigant. *Id.* at 349. The Court admonished that the OSI attorneys' failure to disclose information to Demjanjuk's counsel was inconsistent with the government's obligation to work for justice; the Court found that the Government Attorneys had a duty to work for justice rather than simply for a result which favored their preconceived notion of what the outcome of the legal proceedings should be. *Id.* at 349-50. The personal convictions of the Government Attorneys that they had the right man for extradition did not excuse the reckless disregard of their obligation to provide exculpatory information. *Id.* at 350. Accordingly, the Court vacated its prior order.

In the instant case, CenTra gained information after the record created in the proceedings of the Board below was closed and after the record was sent to the Sixth Circuit Court of Appeals for enforcement proceedings. CenTra's information concerning the clandestine cooperation of its labor consultant with Government Attorney Lund could not have been discovered by greater diligence during the course of the proceedings.

CenTra has gained information which indicates that its own labor consultant, who was called as a key witness by the Board, may have met with Government Attorney Lund to prepare the government's case. CenTra also learned that the same witness was also engaged as the labor consultant of D&S Leasing, the other alleged employer-defendant in the proceedings. At the commencement of the proceedings before the ALJ, Government Attorney Lund voluntarily released D&S Leasing from liability.

CenTra's request for rehearing before the Sixth Circuit Court of Appeals was denied. A complete finding of facts concerning the activities of the labor consultant and Government Attorney Lund may never be accomplished without intervention by this Court because: (i) prehearing discovery is not required in

Board proceedings; (ii) Government Attorney Lund did not disclose to CenTra that he had been meeting with the labor consultant-witness; and (iii) CenTra could not effectively cross-examine the witness at the hearing before the ALJ.

The difference between the civil penalties of extradition in *Demjanjuk* and the huge monetary penalty in the instant case is a difference without a substantive distinction. The Sixth Circuit Court of Appeals cannot bootstrap one civil remedy to a "quasi-criminal" plateau and not another simply to achieve a result that fits within an undefined sense of justice. CenTra is as entitled as Mr. Demjanjuk to be assured that civil Government Attorneys will work to do justice, and not just work to win their cases.

Moreover, in *Demjanjuk*, the Court of Appeals determined that the Government Attorneys acted in good faith, although "recklessly". In CenTra's case, the actions of Government Attorney Lund are within one of two possible categories which cannot be determined without reopening the record before the Board for further testimony and examination. Government Attorney Lund may have (i) acted in good faith but recklessly as in *Demjanjuk*, or (ii) acted in disregard of his duty to seek justice. That cannot be determined without reopening the proceedings below.

B. Attorneys Representing The National Labor Relations Board Are Charged With A Higher Standard Of Disclosure And Conduct Than Are Private Lawyers.

1. Attorneys For Agencies Of The United States Government Are Held To A Higher Standard Of Conduct Than Are Private Lawyers.

Courts and commentators have traditionally held Government Attorneys to a higher standard than private lawyers. *See, e.g., Freeport-McMoRan Oil & Gas Co. v. FERC,* 962 F.2d 45, 48 (D.C. Cir. 1992); *United States v. Witmer*, 835 F. Supp. 208, 214 (M.D. Pa. 1993); *Williams v. Sullivan*, 779 F. Supp. 471, 472

(W.D. Mo. 1991).[1] Government Attorneys must assure that the decision of the tribunal results in justice and not simply in victory for the government. Government Attorneys have a fiduciary duty to the court and the citizens of the United States as well as to their clients, the federal agencies. Government Attorneys owe a duty to the fact finder to bring to its attention all significant facts which might be helpful to the tribunal in reaching a finding that does justice.[2]

A Court of Appeals criticized the overzealous activities of a government lawyer and defined the dual role of Government Attorneys as follows:

> We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.

Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d at 48. Government Attorneys certainly have the obligation to advise the fact finder if a witness they have called to testify perjures himself during the testimony. Failure of Government Attorneys to advise the fact finder that testimony of a government witness is false is a clear breach of that obligation.

This Court has consistently held criminal Government Attorneys to a higher standard because they represent both the sovereign and their personal client:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose

---

[1]*See also* Schnapper, *Legal Ethics and the Government Lawyer,* 32 Rec. A.B.N.Y. 649, 657-58 (1977); Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information,* 51 Iowa L. Rev. 807, 810 (1966).

[2]As officers of the court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993). This is especially true for government attorneys, who have special responsibilities to both this court and the public at large. *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983). "Government attorneys . . . by virtue of their unique position, owe a greater responsibility to the justice system. The courts have come to expect and have rightly demanded a higher degree of candor from government attorneys." *Braun v. Harris*, [1979-80 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 17,070 (E.D. Wis. 1980).

> obligation to govern impartially is as compelling as its obligation to govern at all . . . [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). However, this Court has not given clear direction to the Courts of Appeal concerning the obligation of Government Attorneys in civil actions.

The Courts of Appeal have searched for direction in reviewing the actions of civil Government Attorneys. In an appeal from a decision of a federal regulatory agency, the Circuit Court of Appeals for the District of Columbia rejected the government's argument that its attorneys had no duty beyond those of private lawyers. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d at 45. The Court stated that although the Supreme Court was speaking of government prosecutors in *Berger*, no authority had given prior direction to the courts whether civil Government Attorneys, like Criminal Government Attorneys, are held to a standard higher than that of private lawyers:

> no one to our knowledge (at least prior to oral argument) has suggested that the principle does not apply with equal force to the government's civil lawyers.

Freeport-McMoRan, 962 F.2d at 47.

In *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983), the District of Columbia Circuit Court of Appeals, in an opinion by Judge Antonin Scalia, recognized the need for a heightened duty of conduct on the part of Government Attorneys in actions before the Board:

> The proceeding is not a private action, but a complaint pressed by the Board itself against the party who asserts the need for the testimony. It is repugnant to notions of fairness for the government to seek sanctions for alleged wrongdoing while withholding from the proceeding evidence that would demonstrate innocence.

Id. at 733.

Similarly, in *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), the Court found that attorneys for the Environmental Protection Agency breached their duty of candor by failing to reveal that an agency coordinator had misrepresented his academic credentials. Although the attorneys had determined that the coordinator's false statements were material as a matter of law, they failed to disclose the perjury and continued to litigate the matter unabated. *Id.* at 455, 459. The Fourth Circuit noted that attorneys, as officers of the court, have a continuing duty of candor and must inform the court of developments which may affect the litigation:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions — all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

Shaffer, 11 F.3d at 457.

2. The National Labor Relations Board Holds Its Attorneys To A Higher Standard Of Conduct Than Private Lawyers Under The Code Of Federal Regulations.

Government Attorneys must avoid overzealous tactics and non-disclosure of material information as a counterbalance to the immense resources of the federal government that support their case. A United States District Court observed of Government Attorneys for the National Labor Relations Board:

> [A]n attorney in the employ of the government is not on the same footing as a private attorney. He or she has the august majesty of the sovereign behind his or her every utterance; the economic power in the hands of some individual government lawyers can wreak total devastation on the average citizen. As a result, the attorney representing the government must be held to a higher standard than that of the ordinary lawyer.

Silverman v. Ehrlich Beer Corp., 687 F. Supp. 67, 69-70 (S.D.N.Y. 1987). The Board itself has acknowledged that its General Counsel has a heightened duty:

> the General Counsel, as a public official proceeding in the public interest, exercises a trust encompassing responsibilities beyond those of a private adversary. These include a duty of fairness to all parties and to not knowingly suppress, falsify, or actively or passively misrepresent evidence.

Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, 276 NLRB 276, 296 (1985).

In addition, Board regulations specifically require that Board employees conform to a demanding code of conduct:

> In order to assure the proper performance of the Government's business and the maintenance of public confidence, all employees shall maintain high standards of honesty, integrity, impartiality, and conduct. The avoidance of misconduct and conflicts of interests, apparent or real, on the part of all employees through informed judgment is indispensable to the maintenance of the standards in this part. Since service is the keystone of the Agency's operations, each person who deals with the Agency is entitled to courtesy and consideration. Not only must his case be treated with fairness — there must not be even the appearance of unfairness.

29 C.F.R. § 100.101. Under those regulations, all Board employees, including attorneys, must avoid any action, whether or not

specifically prohibited, which results in preferential treatment or the loss of independence or impartiality. 29 C.F.R. § 100.111.

This Court should clearly hold that Government Attorneys are to be held to the same heightened standard of conduct as the Government's criminal prosecutors in *Berger*. The Government's civil attorneys, no less than their criminal colleagues, represent the sovereign and have an obligation to see that justice is done. The harm to the civil litigant from government non-disclosure and overzealous activities may be nearly as devastating as the penalties of a criminal prosecution.[3] *See Demjanjuk v. Petrovsky*, 10 F.3d 338.

CenTra has reason to believe that Government Attorney Lund was overzealous and breached his heightened duty of conduct. However, that higher standard of care was rendered meaningless by the refusal of the Board and the court below to review and remedy its breach. This Court should direct that Government Attorneys in civil proceedings owe the courts and administrative tribunals a higher standard of conduct than do private attorneys.

C. The Format Of The Proceedings Before The National Labor Relations Board Mandate That The Board Itself Maintain A Heightened Awareness Of The Necessity For Self-Policing.

1. The Absence Of Prehearing Discovery In National Labor Relations Board Administrative Hearings Creates An Opportunity For Abuse By Overzealous Counsel For The National Labor Relations Board.

This case arose through the administrative tribunal hearing scheme of the Board. An attorney for a responding employer is challenged when preparing his defense, because pretrial discovery

---

[3]Justice Brandeis once observed that the courts must be most on their guard to protect liberty when the government's purposes are beneficent:

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1927) (Brandeis, J., dissenting).

in Board proceedings is neither statutorily[4] nor constitutionally required. *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (2d Cir. 1974) (per curiam). The Administrative Procedure Act also does not confer a right to discovery in federal administrative proceedings, *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. 1974) (*en banc*), *cert. denied,* 421 U.S. 980 (1975). Prehearing access to the General Counsel's investigative file is not permitted in Board proceedings. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Counsel, Inc.*, 897 F.2d 1238, 1245 (2d Cir. 1990). The Board and the courts have consistently denied unspecified requests for disclosure of exculpatory material in unfair labor practice proceedings. *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961 (4th Cir. 1985).

CenTra does not challenge the procedure adopted for administrative determinations by the Board. CenTra merely urges that because of the unavailability of discovery necessary to expose perjured testimony, the duty of Government Attorneys to be forthcoming should be assiduously enforced. Under the Federal Rules of Civil Procedure, the discovery process gives counsel an opportunity to test the veracity of testimony without having to depend upon disclosure by the adverse party.[5] In its absence, a litigant must depend upon the integrity and honesty of Government Attorneys for the Board. CenTra, therefore, urges that this Court find that the Government Attorneys have an unbending duty to expose perjured testimony from their own witnesses and to disclose unauthorized, clandestine meetings with representatives of CenTra.

CenTra has reason to believe that its labor consultant, C&G Consultants, and its principal Garavaglia, clandestinely met

---

[4]An employer charged with unfair labor practices is prevented from discovering evidence by the Board or its employees, unless the Board or General Counsel consents to its production or release. *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 872 (10th Cir. 1968).

[5]Cross-examination, — the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate. . . . It has always been deemed the surest test of truth and a better security than the oath.

Wellman, *The Art of Cross Examination* (4th Ed. 1992).

and cooperated with Government Attorney Lund. Garavaglia had been employed as the Vice-President of Labor Relations of Central Transport and Central Cartage for all of the years relevant to the issues before the Board. Following termination of that employment relationship, Garavaglia's company, C&G Consultants, became the labor consultant for CenTra, receiving a quarterly retainer for its services. CenTra had every reason to believe that C&G Consultants, and Garavaglia would act in its best interests.

The concealment by Government Attorney Lund of Garavaglia's duplicity precluded any meaningful cross-examination or impeachment by CenTra. Counsel for CenTra had every reason to believe that the testimony of C&G Consultants and Garavaglia would be consistent with his representation of CenTra in all labor matters. Counsel for CenTra was not prepared to cross-examine Garavaglia as a witness who carried the mantel of apparent knowledge concerning CenTra because he was under contract with CenTra.

Having been ambushed by Government Attorney Lund's voluntary release of D&S Leasing from liability at the commencement of the proceedings and then stunned by the testimony of Garavaglia, Mr. Timothy Carroll, counsel for CenTra, began his cross-examination of Garavaglia. CenTra has discovered that Garavaglia's responses were false and that Government Attorney Lund knew or should have known that the testimony was false and did not correct it:

Q: (by Mr. Carroll, counsel for CenTra):

Mr. Garavaglia, in connection with the investigation of this case, did you provide a statement of any nature to a representative of the National Labor Relations Board?

A: (by Mr. Garavaglia):

No, I did not.

Q: No affidavit, no statement, nothing of that sort?

A: No, sir.

Transcript of Proceedings before the ALJ ("Trans.") at p. 44. Government Attorney Lund must have known that the testimony of Garavaglia was a lie. On information and belief, Government Attorney Lund had indeed met with Garavaglia prior to the hearing in preparation of his case and in preparation of Garavaglia's testimony. However, having received a false denial to his question, Mr. Carroll moved onto other matters without knowing that his client was becoming a victim of perjury by the witness and silent acquiescence by Government Attorney Lund.

Government Attorney Lund had a duty to the court and the judicial system to come forward at that time and advise the ALJ and Mr. Carroll that Garavaglia was not telling the truth. That omission constituted a concealment of material facts. The failure of Government Attorney Lund to speak up misled Mr. Carroll and misled the ALJ. The false testimony by Garavaglia was compounded by the silent acquiescence in that testimony by Government Attorney Lund. That constituted a fraud which requires reconsideration of the finding that CenTra was a joint employer.

As well, Government Attorney Lund knew or should have known that Garavaglia and C&G Consultants would be benefitted by a finding that CenTra was a joint employer with D&S Leasing.[6] Yet Government Attorney Lund presented Garavaglia's direct testimony as being factual and unbiased and silently acquiesced in Garavaglia's perjury at the commencement (and therefore truncation) of Mr. Carroll's cross-examination.

---

[6]If fact finding proceedings were reopened, CenTra would present testimony showing that C&G Consultants was also acting as the labor consultant for D&S Leasing. Further, CenTra would present testimony that Garavaglia had several business ventures with George W. Rogers, the sole shareholder of D&S Leasing, which would be substantially benefitted by D&S Leasing avoiding liability for unpaid wages, pension, and health and welfare contributions in behalf of D&S Leasing's employees.

2. Refusal Of The National Labor Relations Board To Investigate Whether Its Own Counsel Acted Improperly Effectively Forecloses Any Opportunity For The Correction Of Abuse By Overzealous Government Counsel.

This Court has found that 29 U.S.C. § 160(e)[7] precludes a reviewing court from considering an objection that has not been urged before the Board, "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301, 311 n.10 (1979). *See also NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).[8] In fact, this Court has found that the Circuit Courts of Appeal do not have jurisdiction to consider issues which were not raised before the Board if the failure to have raised them is not excused by "extraordinary circumstances". *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 23 (1986) *citing Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Where the complaining party had a realistic opportunity to present its claim to the Board but failed to do so, the Courts of Appeal have not applied the extraordinary circumstances excep-

---

[7]Section 160(e) provides in relevant part:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of *extraordinary circumstances*.

29 U.S.C. § 160(e) (emphasis added).

[8]This Court held that:

> Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested.

and further that:

> Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for.

Labor Board v. Cheney Lumber Co., 327 U.S. 385 (1945). The provision gives emphasis to the "salutary policy" of affording the Board opportunity to consider on the merits questions to be urged upon review of its order. *Marshall Field & Co. v. Board*, 318 U.S. 253, 256 (1942).

tion.[9] Similarly, Courts have not excused the omission of a defense caused by the complaining party's lack of diligence.[10] Conversely, the Courts have held that some occurrence or decision which prevented a matter from being presented to the Board at the proper time may constitute "extraordinary circumstances". The occurrences which have been remedied generally concern late filing of objections[11] or the overruling of the doctrine upon which the prior decisions rested. [12]

This Court has entertained two cases which addressed whether certain claims constituted "extraordinary circumstances" within the meaning of the statute allowing subsequent consideration by an appellate court. In *Labor Board v. Jones & Laughlin Co.*, 331 U.S. 416 (1946), a development deemed extraordinary by the company occurred after the Board had concluded its hearing and issued its order. The issue was not raised before the Board because it could not have been discovered before that time. Accordingly, the Court found that the issue had not been waived. In *Detroit Edison Co. v. National Labor Relations Board*,

---

[9]*See Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396 (5th Cir. 1983) (failure to raise recent Supreme Court decision announced 11 months before Board's decision not excused).

[10]*See NLRB v. Good Foods Mfg. & P. Corp.*, 492 F.3d 1302, 1305 (7th Cir. 1974) (defendant's failure to file exceptions because its attorney was busy appealing his own criminal conviction, defending himself in disbarment proceedings and handling other cases was not excused); *NLRB v. Ferraro's Bakery, Inc.*, 353 F.2d 366, 367 (6th Cir. 1965) (fact that labor relations consultant of employer was pressed for time and confused case with another which he was handling did not constitute "extraordinary circumstances"); *NLRB v. Local Union No. 74 Int. Ass'n of Marble, Slate, Etc.*, 471 F.2d 43, 46 (7th Cir. 1972) (counsel's inexperience and lack of knowledge of Board procedures did not excuse failure to adduce critical evidence or to offer exceptions).

[11]Unforeseen causes beyond the physical control of the objecting party have been excused, such as (i) bad weather, *NLRB v. International Woodworkers*, 238 F.2d 378 (9th Cir. 1956) (snow storm preventing delivery of objections to the Board's offices on the due date), (ii) labor stoppages, *NLRB v. Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959) (telephone and taxi strike preventing delivery of objections); *NLRB v. Marshall Maintenance Corp.*, 320 F.2d 641 (3d Cir. 1963) (unusually early mail pickup delays delivery of objections), and (iii) failure of the objecting company to receive notice that certain documents were not in the record until after the Board's decision, *NLRB v. Advanced Systems Inc.*, 681 F.2d 570, 574-75 (9th Cir. 1982).

[12]*See NLRB v. Wayne Transp.*, 776 F.2d 745, 749 (7th Cir. 1985); *NLRB v. Robin American Corp.*, 667 F.2d 1170, 1171 (5th Cir. 1982) ("It would have been futile, if not frivolous," for respondent to object before announcement of Supreme Court decision overruling previously controlling case).

440 U.S. 301, 311 n.10 (1979), the petitioner did not refer the Court to any substantive reason for its failure to challenge the Administrative Law Judge's recommendation. This Court held that if having "no practical reason" to challenge the Board's finding excused raising those issues before the Board, little would be left of the statute. *Id.* at 311 n.10.

The Court has not decided whether the concealment of evidence indicating an inappropriate collaboration of a company agent with Government Attorneys constitutes "extraordinary circumstances" mandating reconsideration by the appellate court. The Court has similarly not been given the opportunity to determine whether possible misconduct by Government Attorneys before the National Labor Relations Board which might constitute fraud on the court should also constitute "extraordinary circumstances."

Garavaglia did not simply answer questions propounded of him by Government Attorney Lund at the hearing before the ALJ. Garavaglia actively involved himself in Government Attorney Lund's proof of the elements of a joint employer status. For example, Garavaglia was asked who initiated requests for disciplining the D&S Leasing employees. Garavaglia responded by identifying two Central Cartage employees by name. Garavaglia was then asked by Government Attorney Lund whether he ever had discussions with those people concerning his prior response. Garavaglia offered the following expansive testimony:

> . . . There were some people at — that were treating those employees as Central Cartage employees, and disciplining them. I told them that they weren't Central Cartage employees. I told that to Mr. Morrison [a Central Cartage employee]. That those employees were D and S employees.
>
> Q: And what was his response?
>
> A: He wouldn't do it again.

Q: And — but did it happen again?

A: Unfortunately, yes.

Trans. at p. 40. In further questioning, Garavaglia was asked by Government Attorney Lund his position on Mr. Morrison's ability to discipline the employees and again Garavaglia volunteered expansive and damaging testimony:

A: I told Morrison that these people were supposed to be employees of D and S, and he shouldn't be disciplining them and issuing reprimands and time off and firing them.

Q: Okay. Approximately when did this happen?

A: It happened quite a few times.

. . . .

Q: Can you be more specific?

A: '83, '84, '85, '86.

Trans. at p. 60.

When asked whether Garavaglia was involved in any discussions with management people at Central Cartage, Garavaglia offered twice that Central Cartage acted only for reasons of economics. See Trans. at p. 42. Then Government Attorney Lund asked Garavaglia whether he had stated any position at that meeting. Again, Garavaglia offered damaging conclusory testimony as follows:

A: I was not in favor of it, if that's what your question is.

Q: What was your concern?

A: That everybody would end up right where they're at today, here.

. . . .

Q: Okay. Could you elaborate a little bit more? You said that's because we're here right now, what we're here for right now. What did you — reasons did you give them?

A: In my — and it's my personal opinion, from my experience, that they would have been obligated to take the employees, because of the language of their collective agreement under Central Cartage.

Trans. at pp. 42-43.

The cross-examination of Garavaglia later turned to ownership of other employee leasing companies owned by Mr. George Rogers, the owner of D&S Leasing, and the business partner of Mr. Garavaglia in numerous ventures connected with the financial success of D&S Leasing. Mr. Carroll asked Garavaglia a simple question concerning the purchase of stock in Michiana Trucking, Inc. Garavaglia offered damaging testimony that was not even responsive to Mr. Carroll's questions. The colloquy transpired as follows:

Q: All right. So that if George [Rogers] bought it [Michiana Trucking] from Eddie Dougiert [sic], Central obviously had no further position in it. Is that correct?

A: Well, see, he didn't buy it directly. The lien was held by Central Transport, as I remember. He bought the liabilities and contract that Michiana had with Central Transport, but the lienholder of the whole thing was still Central Transport.

Trans. at pp. 52-53.

Had counsel for CenTra known that Garavaglia was attempting to advance the Board's case, counsel for CenTra could have: (i) prepared a cross-examination; (ii) called witnesses who would give evidence concerning the veracity and character of Garavaglia; (iii) presented evidence of the duplicity of Garavaglia, and most importantly; (iv) performed an investigation into whether Garavaglia would be financially benefitted by a *de jure* or *de facto* release of the employer liability of D&S Leasing by the finding that the deep pockets of CenTra could pay the millions of dollars of backpay damages awarded by the ALJ. Also, had Garavaglia's cooperation been disclosed after the ALJ's hearing, counsel for CenTra could have prepared exceptions to that testimony. How-

ever, because the information of Garavaglia's duplicity went undiscovered, a challenge to Garavaglia's damaging testimony was precluded.

In the instant case, the Court of Appeals for the Sixth Circuit found in *dicta* that the Board's factual determination that CenTra, Central Transport and Central Cartage were joint employers was entitled to summary affirmance because CenTra failed to challenge the Board's order on the merits. *NLRB v. CenTra, Inc.*, 954 F.2d 366, 370 n.2 (6th Cir. 1992). The Court of Appeals concluded that "[s]uch a failure constitutes abandonment of the issue." *Id.* The Court of Appeals further found that "on a review of the whole record that substantial evidence supported the finding that Centra acted as a joint employer with D&S." *Id.*

The Court of Appeals failed to recognize that the failure of CenTra to challenge the finding of joint employer status was due to ignorance of the clandestine aid given to Government Attorney Lund in developing and presenting his strategy, witness examination and documentary evidence against CenTra. Counsel for CenTra before the Board was simply not equipped to cross-examine a witness that he had reason to believe would not be secretly aiding the opposing litigant — the government — in breach of his fiduciary duty to his corporate principal.[13]

---

[13]The unreliability of the testimony of Garavaglia is evidenced by the Sixth Circuit Court of Appeals' issuance of opinions in two cases which are mutually inconsistent. In *Central States Southeast and Southwest Areas Pension Fund v. Rogers*, No. 92-2435 (6th Cir. December 16, 1993), the Court of Appeals affirmed a decision below that Rogers; D&S Leasing; Genessee Cartage Co. and Michiana Trucking, Inc. constituted a "controlled group" of companies which are treated as a single employer of the employees of each of the included companies for purposes of withdrawal liability to the Central States Southeast and Southwest Areas Pension Fund (the "Pension Fund") under the Multiemployer Pension Plan Amendments Act ("MEPPA"). By its opinion dated December 16, 1993, the Sixth Circuit Court of Appeals found that the controlled group of corporations was liable for pension withdrawal liability for the cessation of the obligation for pension contributions to the Pension Fund in behalf of the D&S Leasing employees.

However, on January 17, 1992, the same Sixth Circuit Court of Appeals found in *NLRB v. CenTra, Inc.*, 954 F.2d 366 (6th Cir. 1992) that CenTra was liable as joint employer with D&S Leasing to make those contributions to the Pension Fund in behalf of those same D&S Leasing employees. Now, incredibly, the Pension Fund has commenced a collection action against Central Transport, Inc. and Central Cartage Co. to pay the withdrawal liability of D&S Leasing. Initial discovery has disclosed that Government Attorney Lund who presented the case against CenTra before the ALJ, is working in

3. This Case Gives The Court An Opportunity To Decide Whether A Suggestion Of Overzealous Activities By A Government Civil Lawyer Constitutes An Extraordinary Circumstance Mandating Reconsideration Of A Decision By The National Labor Relations Board.

This case presents this Court with the opportunity to find that later discovered indications of potential misconduct by a civil government lawyer either (i) constitutes *per se* "extraordinary circumstances" allowing a Court of Appeals to consider issues not raised before the Board, or (ii) creates a presumption that "extraordinary circumstances" exist which may allow a Court of Appeals to consider issues not raised before the Board, or (iii) creates the opportunity for the Courts of Appeal to remand the proceedings to the Board to allow inquiry into whether improprieties occurred and whether those improprieties led to an erroneous judgment.

---

conjunction with the Pension Fund to find liability against Central Transport and Central Cartage. The cooperation of the Government Attorney Lund with the Pension Fund appears to have begun upon the filing of Petitioner's Motion to the Sixth Circuit Court of Appeals for relief from its finding of joint employer status based upon improper actions by the Government Attorney Lund. Not too surprisingly, Garavaglia also met with the Pension Fund and has testified in a deposition favorably to the Pension Fund.

CONCLUSION

In *Demjanjuk*, the Sixth Circuit held Government Attorneys to a higher standard of conduct than private lawyers due to their responsibility to the public at large and the court system. They must seek to do justice as well as to win their cases. The same principles of fair play must be applied to the instant case where the discovery rights of the Federal Rules of Civil Procedure are inapplicable and CenTra could not protect itself from the possibility of overzealousness on the part of the Government Attorney.

Government Attorneys breach that duty of conduct by clandestinely meeting with witnesses for the opposing litigant, agreeing to release liability in return for cooperation and by silently acquiescing in perjured testimony aimed at foreclosing cross-examination.

Respectfully submitted,

Patrick A. Moran*
Scott T. Stirling

EVANS & LUPTAK, P.L.C.
2500 Buhl Building
Detroit, Michigan 48226
Telephone: (313) 963-9625
Attorneys for Petitioners

* Counsel of Record

No.

In The Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC.,
CENTRAL TRANSPORT, INC.,
AND
CENTRAL CARTAGE COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPENDIX

PATRICK A. MORAN*
SCOTT T. STIRLING
2500 Buhl Building
Detroit, MI 48226
(313) 963-9625
ATTORNEYS FOR PETITIONERS
**Counsel of Record*

TABLE OF CONTENTS

		PAGE
APPENDIX A:	Decision of Administrative Law Judge, August 31, 1987	1a
APPENDIX B:	Decision and Order of National Labor Relations Board, August 31, 1990	36a
APPENDIX C:	Opinion of the Court of Appeals, January 17, 1992	54a
APPENDIX D:	Order of the Court of Appeals, Denying Motion to Set Aside Settlement, to Set Aside Enforcement and to Grant Rehearing, February 18, 1994	66a
APPENDIX E:	Order of the Court of Appeals, Denying Petition for Rehearing and Suggestion for Rehearing En Banc, April 29, 1994	68a
APPENDIX F:	Relevant Statutory Provision 29 U.S.C. § 160(e)	70a

APPENDIX A

Decision of Administrative Law Judge
August 31, 1987

Appendix A

APPENDIX A
DECISION

Statement of the Case

DONALD R. HOLLEY, Administrative Law Judge:

Upon an original charge filed in Case 8-CA-19212 on 3 June 1986,[1] by Archer Bailey, III, an individual, and an original charge filed in Case 8-CA-19282 on 27 June by Teamsters Local Union No. 964, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Local 964), the Regional Director for Region 8 of the National Labor Relations Board issued Order Consolidating Cases, Consolidated Complaint and Notice of Consolidated Hearing on 29 August which alleged inter alia, that D&S Leasing, Inc., Central Transport, Inc., and Central Cartage Company, as joint employers of described employees, had violated Section 8(a)(1)1, and (3) and (5) of the National Labor Relations Act, as amended (herein called the Act). Central Transport, Inc. (herein called Respondent Transport) and Central Cartage Company (herein called Respondent Cartage) filed timely Answer to Complaint denying they had engaged in the unfair labor practices alleged in the Complaint. D&S Leasing, Inc. (herein called Respondent D&S chose not to file an Answer to the Complaint.[2]

This case was heard in Cleveland, Ohio during the period 23 March 1987 through 27 March 1987. All parties appeared and were afforded full opportunity to participate. Upon the entire record, including briefs filed by the parties and from my observation of the demeanor of witnesses who appeared to give testimony, I make the following:

---

[1]All dates herein are 1986 unless otherwise indicated.

[2]All allegations of the Complaint are deemed to be admitted by Respondent D & S.

Appendix A

Findings of Fact

I. Jurisdiction

Respondent, D&S, a michigan corporation, maintains an office and place of business at 2218 Main Street, Milford, Michigan. It is engaged in providing leased employees to trucking industry enterprises, and, in the course and conduct of such business, it annually derives gross revenues in excess of $50,000 from other enterprises located within the State of Ohio, which are engaged in commerce other than on an indirect basis.

Respondent Transport, a Michigan corporation, with its principal place of business located at 34200 Mound Road, Sterling Heights, Michigan, is a common carrier in the interstate and intrastate transportation of freight and commodities. It annually derives gross revenues in excess of $500,000 from the transportation of freight and commodities from the State of Ohio directly to points located outside the State of Ohio.

Respondent Cartage, a Michigan corporation, with its principal office and place of business at 34200 Mound Road, Sterling Heights, Michigan, maintains other places of business in Ohio, Michigan, and Indiana, including a terminal located at 5400 West 137th Street, Cleveland, Ohio. Annually, in the course and conduct of its business, it provides services valued in excess of $50,000 to other enterprises located within the State of Ohio, including General Motors Corporation and the Ford Motor Corporation, which are engaged in commerce on other than an indirect basis.

It is admitted, and I find, that Respondent D&S, Respondent Transport, and Respondent Cartage are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Appendix A

II. Status of Labor Organizations

It is admitted, and I find, that the following local unions, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act: Teamsters Local Union No. 20-(herein Local 20); Teamsters Local Union No. 119 (herein Local 118); Teamsters Local Union No. 449 (herein Local 449); truck Drivers Local Union No. 407 (herein Local 407); and Local 964.

III. The Alleged Unfair Labor Practices

A. Facts

Transport and Cartage are wholly owned subsidiaries of Centra, Inc. All three corporations are headquartered at 34200 Mound Road, Sterling Heights, Michigan. The Moroun family, specifically T.S. Moroun, who is the patriarch, and his four children, Matty and Matty's three sisters, own all the stock of Centra. The board of directors of each corporation is essentially the same, except Robert Goodheart, the president of Transport, sits on only that corporation's board of directors, and Larry Thomas, the president of Cartage, sits on only that corporation's board of directors. Ron Leach, a nonfamily member, is executive vice president of Transport and Cartage. The record further reveals that the foregoing officers of all three corporations have offices in the headquarters building in Sterling Heights, Michigan.[3]

Transport is a common carrier which utilizes owner-operators who pull Company owned trailers. It transport freight and commodities to and from forty-eight (48) states. Cartage operates

---

[3]The Complaint was amended during the hearing to allege that Centra, Transport and Cartage constitute a single employer. Counsel for the named Respondents concedes in brief (p. 2) that they may be treated as a single employer in this proceedings. Accordingly, I find Centra, Transport, and Cartage (herein collectively called Central) is a single employer within the meaning of the Act.

terminals throughout the United States and is engaged primarily in the pickup and delivery within city zones of freight transported over-the-road by Transport. The Central terminal located at 5400 West 137th Street, in Cleveland, Ohio (herein called the Cleveland terminal and/or the Bookpark facility), is the only terminal involved in this proceeding.

In mid-1982, Transport successfully bid some automotive consolidation work with General Motors corporation. The consolidation work was to be performed in Cleveland. At the time, Cartage held a lease on property in Cleveland where it maintained a terminal. Its terminal employees were represented by Local 407, and it was signatory to the Teamsters National Master Freight Agreement. To enable it to perform the consolidation work required by its contract with General Motors, Transport subleased certain facilities at the Cleveland terminal from Cartage.[4] Although Cartage normally performed dock work and trailer switching such as that needed to accomplish the above-described consolidation work for Transport, Central management decided to obtain employees to accomplish the consolidation work at the Cleveland terminal from D&S, a personnel leasing company. To that end, Charles Garavaglia, vice president of labor relations for both Transport and Cartage, and Goodheart met with George Rogers, D&S president and sole owner, to ascertain whether D&S would lease Transport employees for a stated package price.[5] Garavaglia testified Rogers was informed the employees furnished at the Cleveland facility would have to be represented by a union. D&S agreed to furnish the employees.

---

[4]Cartage leased the property from GLS Leasco, another wholly owned subsidiary of Centra.

[5]D & S was to carry the employees on its payroll and it was to pay all amounts required by federal and state law as well as amounts which were to be remitted in accordance with any union contract. Transport was to reimburse D & S for its expenditures and pay it a percentage which fluctuated with the size of the payroll.

Appendix A

In mid-1982, D&S became signatory to a so-called "white paper" agreement with Teamsters Local 507.[6] The agreement covered the employees performing automotive consolidation work for Transport at the Cleveland terminal.[7] Garavaglia testified he attended the first negotiation session leading to consummation of the agreement to explain the economic parameters acceptable to Transport, and to stress the need for provision for flexible working hours for covered employees because the consolidation work was to be performed pursuant to General Motors' "just in time" concept. Thereafter, Rogers and Local 507 reached agreement. It contained wage rates which were more favorable than those contained in the National Master Freight Agreement, and it contained provisions which afforded D & S flexibility in hours employees worked. Garavaglia testified a copy of the agreement was given to him for review before it was signed. After it was executed, Rogers supplied Garavaglia, Goodheart, and Transport's payroll office with copies.

Rogers testified he sought to staff the Cleveland facility by placing ads in Cleveland newspapers and leaving D & S employment applications with Cartage's terminal manager, Bruce Morrison. While Rogers would interview applicants if he was in Cleveland when they responded to the ads he had placed, he uniformly sent them to Morrison after he talked to them. Morrison's approval was necessary before they were hired. In many, if not most instances, Morrison interviewed applicants in Rogers' absence, hired them, and caused them to complete a D & S employment application which was then sent to D & S' headquarters in Milford, Michigan, so they could be put on the D & S payroll.

---

[6]White paper agreements are agreements which contain terms of conditions of employment which are different from those contained in the National Master Freight Agreement which normally controls wages, hours and conditions of employment in cartage operations which maintain contractual relations with the Teamsters.

[7]The consolidation work involved the handling of automotive parts on a dock and switching or spotting of trailers which were to be loaded or unloaded.

Appendix A

Neither Transport nor D & S had any personnel at the Cleveland terminal who could provide supervision of the D & S employees performing the consolidation work at the inception of the arrangement. It is uncontradicted that Cartage employees including Morrison, Jim Berquist (operations manager), and dock foremen Wayne Gentry and John Smith provided the required supervision of D & S employees. Thus the record reveals those individuals: gave D & S employees their work assignments; scheduled their working hours; caused the employees to punch timecards; approved or disapproved requests for time off or vacation; assigned employees to train new hires; and documented on the Central's computer work deficiencies or rules violations. Newly hired employees were required to satisfactorily complete a 30-day probationary period and the named individuals decided whether they would be retained during the period.[8]

Rogers testified that he obtained a payroll runoff and a computer listing of employee infractions from Cartage each week. The payroll information indicated the number of hours worked by each employee and his straight time and overtime earnings. Utilizing his D & S computer, he processed the information provided by Cartage to prepare checks for the Cleveland employees which were delivered by Transport to the Cleveland terminal where the Cartage dispatcher distributed them to employees. Similarly, he processed the listings of employee infractions by causing reprimands to be issued to employees along with their

---

[8]Respondents Transport and Cartage denied that Garavaglia, Morrison, Jim Berquist, and dock foremen (John Smith, Wayne Gentry, Jim Bowen, and Joe Imondi) were, at times material, supervisors and agents of such Respondents within the meaning of the Act. Significantly, no argument concerning such issues is set forth in Respondent's post-hearing brief. Uncontradicted record evidence reveals: Garavaglia determined the labor policy of Transport and Cartage until April 1986; that Morrison and Berquist supervised the dock foremen and possessed numerous indicia of supervisory authority, including the authority to hire and fire D & S employees; and that dock foremen, who were salaried at $500 to $700 per week, in addition to exercising the authority over D & S employees set forth above, fired employees, and refrained from calling in employees who did not follow their orders. It is clear, and I find, that the individuals named above were, at all times material, supervisors and agents of Respondents Transport and Cartage within the meaning of Section 2(11) and (13) of the Act.

paychecks. He testified he rarely became involved in reprimands which did not involve discharge or time off. Instead, one of the three D & S clerical employees employed in the Milford office would prepare the reprimands and issue them over Rogers' signature.

Rogers stated that prior to November 1984, he visited the Cleveland terminal approximately once every month. During those visits, he would discuss grievances with Morrison and employees. If grievances progressed beyond the local level (State or Joint Area Conference in Chicago), Rogers represented D & S at the hearings. In this regard, he indicated he usually discussed the approach he should take with Garavaglia to ascertain, among other things, whether he had a case, and he relied on Morrison for documentation related to the grievances. Rogers had no authority to withdraw a grievance without Morrison's approval, and he had no authority to agree to backpay or reinstatement of an employee without Morrison's approval.

At some point in late 1982, Local 964 replaced Local 507 as the bargaining representative for D & S employees working at the Cleveland facility. Local 964 and D & S executed a collective-bargaining agreement containing the same provisions which were set forth in the D & S-Local 507 agreement.

During the term of the above-described agreement (1982-1985), Rogers, and subsequently Lawrence Koubeck, were the only persons who represented D & S in grievance matters which proceeded to the State or Joint Area Conference (Chicago) level. However, on the local level Central personnel, principally Garavaglia and Morrison were frequently involved in administration of the contract as well as the processing of grievances. With respect to administration of the contract's provisions, Cartage posted bids which permitted employees to select their working hours in accordance with the seniority provisions of the contract, called in extra employees it needed from time to time in seniority order, maintained in its computer contract violations or breaches of rules committed by employees, provided employees safety and related

equipment required by the contract,[9] interpreted the holiday provisions of the contract to determined when holiday pay was due employees, and generally sought to effectuate and comply with other contract provisions directly related to the wages, hours, and working conditions of employees which were contained in the agreement. With respect to local level grievance proceedings, the record reveals Garavaglia and Morrison met with Local 964 representatives on a number of occasions to discuss the hours employees were expected to work, terminations, and safety and related matters. Garavaglia admitted during his testimony that he met with Local 964 officials to discuss safety complaints voiced by D & S employees, and he testified he attended a number of local meetings with Local 964 to discuss grievances which were filed because Morrison had fired D & S employees.[10] Employee Gruszezynski, a Local 964 steward, testified, without contradiction, that Garavaglia also attended a meeting shortly after the D & S operation commenced at which he agreed the workday would be reduced from 20 hours to 10 hours. it is undisputed that Morrison attended a number of the Local grievance meetings where grievances concerning discharges he had effectuated were discussed. With respect to safety and related matters, the record reveals Garavaglia acknowledged Cartage was responsible for assuring safety at the terminal and it was obligated to supply protective items such as gloves, rain gear and gas masks to employees. In addition to the fact that Garavaglia acknowledged he met with Local 964 representatives to resolve complaints concerning safety, the record clearly reveals that as late as March 1986, Garavaglia

---

[9]Morrison claimed during his testimony that he purchased rain gear employees were contractually entitled to receive to simply stop employee complaints. The record reveals, however, that Garavaglia treated D & S employee safety as a Central obligation.

[10]Two specific incidents were described by Oswald Kelm, Local 964's president and business agent, i.e., Morrison's termination of a D & S employee for fighting on the premises, and his termination of another employee accused of theft. Kelm's uncontested testimony reveals Morrison and/or Garavaglia agreed to return both employees to work. Significantly, Rogers testified 18-20 D & S employees were fired during the time he supplied employees to the Cleveland facility, but he could not recall a single incident in which he or Koubeck had fired an employee.

apologized by letter because he had been unable to attend a scheduled 9 March meeting at which safety and security grievances involving the terminal were to be discussed. In the letter under discussion, Garavaglia set forth measures taken by Central to rectify the complaints.[11]

From mid-1982 until some unstated time in 1983, the only D & S person who exercised any control over D & S employees working at the Cleveland facility was Rogers. For about a year during the 1983-1984 period, D & S utilized two (2) leadmen and/or working foreman at the facility. The first, Tommy Hughes, stayed about a month. The second, Joe Mechaiti, stayed about a year. A description of the position is set forth in an addendum to the 1982-1985 contract between D & S and Local 964. It is as follows:[12]

> The Working Foreman shall be an employee who has a separate classification which shall pay him 15 cents an hour above the dockman's classification. His classification and job description shall be that he can do all work in the classification of dockman, but additionally direct, assign, supervise, designate hi-lo's, and the number of employees on assignment of a specific job.
>
> He cannot hire, or fire, or discipline employees and will also be under the supervision of the customer while working.
>
> The Working Foreman must be approved by the customer as well as the employer.

In November 1984, Rogers hired Lawrence Koubeck, a resident of Cleveland, and made him vice president of D & S. Koubeck testified he spent approximately two-thirds of his working time with D & S in Cleveland and the remaining one-third recruiting drivers for Central out of town. When he was in

---

[11]See General Counsel Exhibits 11 (Agenda for 9 March meeting) and 17 (Garavaglia's letter to Kelm).

[12]See General Counsel Exhibit 3.

Cleveland, he recruited employees for the Cleveland facility, took their applications, interviewed them, and sent them to Morrison if he felt they were qualified. Morrison decided whether they should be hired. Additionally, Koubeck handled grievance matters at the facility by issuing reprimand letters after receiving notice of employee infractions from Cartage, and he took disciplinary action against employees when it was warranted. He represented D & S at local, state and regional grievance hearings. Cartage personnel continued, from November 1984 until February 1986, to provide day-to-day supervision of D & S employees, and it continued to schedule their working hours, handle their requests for time off, and call in extra employees from the seniority list as needed.

In 1985, D & S and Teamsters Locals 964, 20, 118 and 449 executed a new collective-bargaining agreement which was to be effective from 1 June 1985 through 31 March 1988.[13] Steven Bridge, an employee of a multi-employer association named Motor Carrier Labor Advisory Council (MCLAC), and Rogers represented D & S in the negotiations. Andrew Suckart and Chuck Gauguin represented Local 964. Rogers testified no Transport official participated in the negotiations, but he got the wage parameters from Central. The union negotiators sought during the negotiations to place a work preservation clause in the contract to assure that D & S employees would follow their work. Rogers refused to agree to such a clause, indicating his customer (Transport) would not tolerate it. The executed contract contained so-called "house account" language that applied from one D & S location to another. Copies of the contract were given to Morrison and Central's payroll department.

---

[13]Unlike the 1982-1985 agreement, which was between only D & S and Local 507 (subsequent Local 964), the 1985-1988 agreement covered D & S employees working within the jurisdiction of Locals 20, 118, and 449. The record reveals the employees covered by the agreement were engaged in dock/yardman or road operations work at, inter alia, a boiler firm in Buffalo, New York, an AMC-Jeep consolidation operation in Toledo, Ohio, and at the Central terminal in Cleveland.

Appendix A

By letter dated 20 January 1986, Cartage president Thomas advised D & S, inter alia, that while Cartage would schedule the terminal, D & S was responsible to call the people necessary to staff the schedules; that Rogers and Koubeck had failed to meet that responsibility; and that continued failure by D & S to supply dockmen at the Cleveland terminal would result in termination of D & S as the supplier of dockmen to the Cleveland terminal.[14] On 23 January 1986, Koubeck issued a memo to the D & S employees working at the Cleveland terminal which informed them, inter alia: that employees calling out of service were required to call his home telephone number 1 hour prior to starting time; that employees calling back into service were to telephone his number 2 hours prior to his starting time; that D & S was to be directly responsible for setting up replacements and/or additional personnel required by Central Transport; and that Central Transport would call employees directly between midnight and 6 a.m. in case of emergency or for replacement for absenteeism.[15]

Garavaglia testified, without contradiction, that in February or March 1986, he met with Moroun, Goodheart, Thomas, Richard Silverwood and Hank Bichard[16] and it was decided that Cartage could hire new employees to perform the Cleveland dock work cheaper than D & S was performing it. Garavaglia asserted he advised against taking such action indicating he thought they would be obligated to take the D & S employees and litigation would result.

During the spring of 1986, Central and union representatives met in Washington, D.C. to discuss on-going litigation. Sherman Brown, who was then acting on behalf of the Teamsters National Freight Industry Negotiating Committee, indicated the

---

[14]See Respondent Exhibit 4.

[15]Respondent Exhibit 3.

[16]Garavaglia testified he hired Silverwood to handle labor relations for Cartage and Bichard to handle labor relations for Transport.

participants discussed leasing companies during the meeting. The International Union representatives voiced their opinion that leasing companies were used as a way to get around union standards. While Brown recalls Central representatives attending the meeting indicated they would see what they could do about leasing companies, he testified nothing was agreed upon during the meeting.

At some unspecified time in early May 1986, Joe Goryl, a Central official, telephoned Morrison and instructed him to prepare a list of names of D & S employees he felt should be hired by Cartage when it took over the dock operation in Cleveland. Morrison testified he reflected on his personal knowledge of the work performed by individual employees and gave Goryl the seventeen (17) typewritten names set forth on General Counsel Exhibit 37 about mid-May. Morrison denied that the union activities of employees influenced his selection, and he claimed he chose employees he considered to be "super stars" without looking at their personnel files.

By memo dated 8 May 1986, Joe Goryl sent a memo to Thomas, Cartage's president, which states:

SUBJECT: PROPOSED DOCK CONVERSION IN CLEVELAND.

It has been determined that we will employ approximately 15 D & S Cleveland dock employees to the 45 man Central Cartage seniority list.

A background check on all of the 15 candidates should begin immediately provided each man meets our minimum requirements. The conversion should take place over a 4 week period. Week 1 will consist of hiring 5 (D & S) dockmen in an established seniority order. Week 2 we will hire and additional 5 (D & S) dockmen and in week 3 we will hire the final 5.

Appendix A

> During the 3 week period we will be actively pursuing new applicants (anonymously) so that we will have at least 30 good candidates by the start of the 4th week. At the start of week 4 we will begin to phase in some of the new dockman. At the end of week 4 we should be in a position to terminate the use of D & S leasing entirely. At this time we will phase in the additional new dockmen and continue to use a number of prior D & S casuals temporarily until all of the new dockmen are in place and trained.

Although Morrison failed to fully describe his early May conversation with Goryl, he indicated the plan outlined in the above-quoted memo was discussed during the conversation. Apparently, Morrison was also instructed by Goryl to commence an effort to obtain new hires for the Cleveland dock operation by advertising in Cleveland newspapers as he admittedly placed an add for dock workers in the 15 May 1986 issue of a local newspaper named Plain Dealer.[17]

When Oswald Kelm, the president of Local 964, learned of the ad which had been placed in the Plain Dealer, he telephoned Morrison and asked him what was going on. Kelm testified, without contradiction, that Morrison told him he did not know anything about it and had nothing to do with it. Kelm thereafter sent Morrison a registered letter dated 16 May, the body of which states:[18]

> YOUR AD WAS IN THE CLEVELAND PLAIN DEALER TO HIRE DOCKMEN FOR CENTRAL CARTAGE CO. TO SUPPORT THE LOCAL OPERATION. ALSO, YOU WOULD BE PAYING UNION SCALE AND BENEFITS.
>
> LOCAL 964 NOW HAS A CONTRACT WITH D & S LEASING TO COVER THE DOCK WORK.

---

[17]See General Counsel Exhibit 18.

[18]See General Counsel Exhibit 19.

Appendix A

TEAMSTERS LOCAL NO. 964 MEMBERS HAVE BEEN DOING THE DOCK WORK FOR THE PAST FOUR YEARS ON THE CENTRAL TRANSPORT DOCK. WE WOULD LIKE TO KNOW WHAT EFFECT THE HIRING OF DOCKMEN, UNDER CENTRAL CARTAGE CO., TO SUPPORT THE LOCAL OPERATION, WOULD HAVE ON OUR BARGAINING PEOPLE'S WORK.

THE AD ALSO STATES, UNION SCALE AND BENEFITS WILL BE PAID. WE ARE ASKING, "UNDER WHAT CONTRACT WOULD THIS BE PAID?"

LOCAL NO. 964 IS VERY DEEPLY CONCERNED AS TO WHY CENTRAL CARTAGE CO. WOULD HIRE DOCKMEN TO SUPPORT A LOCAL OPERATION. "WHAT OPERATION?"

MAY WE RECEIVE YOUR REPLY AS SOON AS POSSIBLE. THANK YOU.

While the record clearly reveals Kelm's 16 May letter was never answered in writing by D & S, Transport, or Cartage, the testimony describing what occurred between 16 May and 2 June is conflicting. Kelm testified he attempted to telephone Thomas, Cartage's president, and Silverwood and neither would return his calls. He claims he spoke with Morrison several times at the terminal, and Morrison continued to tell him he knew nothing. Kelm's recollection was that Silverwood finally returned his call after the 2 June changeover and, when he (Kelm) told him cancellation of the contract with D & S had no bearing on the people working on that dock, Silverwood responded that International Union official Sherman Brown and Jack Yager had instructed Thomas to get rid of leasing companies earlier in the year in Washington, D.C., and the people go with the company.

The Teamsters Convention was held in Las Vegas, Nevada, during the week of 19 May 1986. Silverwood attended and discussed Central's intention to perform the work at the

Cleveland facility with Andy Suckart, business representative of the Teamsters Ohio Conference and Teamsters Joint Council 41, Steven Bridge, and Robert Cassidy.[19] During his discussions with the named individuals, Silverwood sought to ascertain whether they were of the view that the 1985-1988 D & S contract with various Teamster Local Unions obligated Central to hire all the D & S employees working in Cleveland when it assumed control of that operation. Each of the named individuals agreed there was no "mechanism" in the contract which would impose such a requirement. However, Suckart urged Silverwood to take all the D & S employees. Silverwood indicated Central intended, instead, to pick and choose employees.

Silverwood testified he had three or four telephone conversations with Kelm in May before Cartage commenced to perform the dock work at the Cleveland facility on 2 June. He recalled Kelm called him around the second week in May to ask if they were doing away with D & S in Cleveland. he claims he said he had no idea what was going on down there; he was not aware anything was going to change. According to Silverwood, Thomas filled him in on the situation several days later, and Kelm telephoned him again several days later. He recalled Kelm again asked if hey were going to do away with D & S Leasing, and he claims he replied they had been informed by the International they were to do away with lease companies and they would be hiring Cartage employees to perform the work in Cleveland. Silverwood claims Kelm then asked if they were going to be hiring 964 employees, and testified his reply was that Cartage had a contract with Local 407 and none with Local 964 for local cartage. Silverwood claimed he said they would deal with either local but they did not want a jurisdictional dispute. He recalled Kelm again asked if they were going to hire D & S people, and that he replied Cartage would hire their own, but they would

---

[19]Suckart and Bridge participated in negotiations leading to the 1985-1988 collective-bargaining agreement between D & S and Teamsters Locals 964, 20, 118, and 449. Cassidy and Bridge are the union and management chairmen, respectively, of the Ohio Grievance Committee.

make sure applications were taken from and interviews were extended to all D & S employees that wanted to be interviewed. Silverwood testified Kelm telephone him two more times within a week or so of 2 June. In both conversations he asserts Kelm asked if he was going to hire the D & S people; whether they would be hired in seniority order; and when Local 964 would be permitted to represent them. He claims he responded by saying they were not going to hire all the D & S people, but would provide anyone who applied with applications and interviews. Additionally, he claims he told Kelm they would live with whoever shook out of the deal; that they did not want to get involved in a jurisdictional dispute. Finally, Silverwood testified about a week prior to 2 June, Larry Thomas told him Kelm was at the Cleveland dock telling everyone he had been assured everybody would be hired in seniority order and that caused him to place a call to Kelm's office. He testified Kelm was not in and he told Mr. Compo, a union official who was in, that he had not any time told Kelm they were going to hire the people in seniority order. Silverwood testified Compo informed him Kelm would be in the office at 1 p.m. and he should call back then. He claims he did call back and conversed further with Compo, telling him again he never told Kelm they were going to hire D & S employees in seniority order, and telling him they would interview all D & S employees who filed applications. During the second conversation, Silverwood claims he heard Compo say: "Ozzie, make sure you know what you are talking about before you relay it to the people because we don't want to give them bad information." He indicated, however, that he did not actually know whether Kelm was in the office or on the phone at the time. Compo was not called by General Counsel or Charging Party to refute Silverwood's versions of the conversations under discussion.[20]

---

[20]While I do not credit Kelm's claim that Silverwood refused to discuss Cartage's intentions with respect to the Cleveland operation with him prior to 2 June, I do not credit Silverwood's claim that he was completely open with Kelm and informed him, prior to the time Thomas told Silverwood that Kelm was telling D & S employees they would all be hired by Cartage in seniority order, that Cartage was not going to hire all the D & S employees. The Goryl memo indicated Cartage was to proceed "anonymously" with

Appendix A

As noted above, Morrison recommended in mid-May that seventeen (17) persons employed by D & S be hired when Cartage commenced to operate the Cleveland facility. When the Cleveland terminal operations manager, Berquist, returned from vacation in the latter part of May, he recommended that five (5) additional D & S employees be hired by Cartage, and individuals in Central's headquarters decided an additional four employees should be hired. General Counsel's Exhibit 41 contains a listing of the 26 D & S employees hired by Cartage on or about 2 June.[21] At or about the same time, Cartage hired thirty-two (32) persons who had formerly been employed by D & S.[22] All employees hired by Cartage were treated as new hires, and were paid and accorded the benefits set forth in the National Master Freight Agreement.[23]

The record reveals Koubeck appeared at the Central terminal on 31 May to inform D & S employees they had no job after that date unless they were called by Central. Employee Donald Gruszezynski, a former union steward, testified Koubeck's announcement caused him to ask dock foreman Jim Bowen what was going on. He testified Bowen told him they were trying to get rid of Kenny Glenn, Archie Bailey, Kenneth Meyers, Grabinski

---

respect to the hire of persons other than D & S employees and the record clearly reveals Morrison withheld details concerning Cartage's intentions from Kelm. I am not convinced Silverwood was as open as he claims and gained the impression when he was giving testimony that he was embellishing to a considerable extent.

[21]General Counsel Exhibit 40 is a list of D & S employees who completed applications and were interviewed but were not hired. The record reveals all D & S employees, including those who were hired, were granted two perfunctory interviews of short duration. It is clear Cartage officials had decided which D & S employees were to be hired before interviews were conducted.

[22]See General Counsel Exhibit 39.

[23]See Charging Party Exhibit 2, Article 51 (Vacation — 1 week after 1 year), Article 54 (Health and Welfare Benefits — coverage after 30 day probationary period with employer contribution of $66.70 per week per regular employee, and Article 60 (Wages — 70 percent of classification rate for first year of employment, 80 percent second year, and 90 percent third year). Application of the National Master Freight Agreement caused former D & S employees wages to drop about $2.00 per hour, altered their vacation entitlement, and deprived them of health and welfare coverage for 30 days.

and Peters.[24] Similarly, employee Kenneth Meyers, then a union committeeman, testified that, after Koubeck notified him by phone that D & S was no longer on the dock, he called dock foreman Wayne Gentry and asked if he was going to be called back. He testified Gentry told him he was a committeeman and Morrison did not like union people so his chances were slim. Meyers claims Gentry told him the next day he was not coming back because he was a union committeeman. Additionally, he testified a second foreman, Joe Imondi, told him while he was cleaning out his locker, that he and (Bailey) were not coming back because they were with the Union.

Dock foremen Bowen, Gentry and Imondi uniformly testified they played no part in the selection of D & S employees who were to be hired by Central. Each indicated he had no knowledge of who was to be hired until a meeting was held at the Cleveland Airport Sheraton on 1 June. Bowen categorically denied that he had any conversation with Gruszezynski which concerned the selection process. He testified he was asked by employees Grabinski and Ochall why they has not been hired and claims he told both of them that he had no idea; that they should ask Bruce Morrison.[25] Gentry testified he spoke with Meyers on 31 May and again on 1 June after the Sheraton meeting. He claims he merely told the employees on 31 May that he had no idea whether he would be hired. With respect to the 1 June conversation, he indicated he told Meyers he could not understand whey he had not been hired as he had always been satisfied with his work; that

---

[24]Bailey was the union steward at the Cleveland terminal at the time.

[25]Gruszezynski was the more impressive witness and I credit him. In doing so, I have taken into account a breakfast conversation Sherman Brown, a business agent for Teamsters Joint Counsel 41 and the Ohio Conference, had with Silverwood the first week of June. During that conversation, Brown claims Silverwood told him they were not going to take the D & S employees by seniority because they wanted to get rid of four to five of them that had high seniority. Brown claims Silverwood asked him if there was anyway they could get rid of five guys and testified he told him he must be crazy. Silverwood denied making the described remarks, claiming he knew nothing about the Cleveland personnel at the time. His version of the conversation was not convincing and I credit Brown completely.

the only thing he could think of was his association with the Union.[26] Imondi testified he was made a dock foreman when D & S left. He admitted conversing with Meyers concerning the reason(s) several employees may not have been hired. He admitted he told Meyers he felt he had run the city operations well and that maybe he was not called back because he was with the Union. Imondi testified he could not recall whether he and Meyers discussed the possible reason Bailey was not hired.[27]

On 2 June, former employees of D & S not hired by Central started to file grievances protesting Central's failure to hire them. On 3 June, Local 964 union steward Archer Bailey filed the first charge in this case. On 4 June, Local 964 sent Central a letter requesting a response to its 16 May letter, and on 27 June, Local 964 filed a grievance which alleged that D & S, Transport, and Central, as joint employers, terminated thirty-three (33) named employees on 31 May 1986 "... a part and parcel of a scheme to avoid its wage and benefit obligations established pursuant to a collective bargaining agreement."[28] On the same date, it filed the charge in Case 8-CA-19282.

Since 2 June 1986, Respondent Central has recognized Local 407 as the bargaining representative of the employees performing dock and trailer switching work at the Cleveland terminal.[29] Former D & S employees working at the facility work on withdrawal cards and pay Local 407 a fee for representing them. Newly hired employees who were not members of Local 964, pay Local 407 the normal dues and initiation fees. On 20 August 1986, Local 407 filed a grievance on behalf of the

---

[26]Meyers exhibited slight confusion when describing the two incidents. Gentry was more impressive and I credit his versions of the conversations.

[27]I gained the impression Imondi did not want to remember I credit Meyers.

[28]See General Counsel Exhibit 21.

[29]By letter dated 28 May, Local 407, indicated its understanding that the D & S employees were to be hired by Cartage; it observed it was the representative of Cartage employees in Cleveland; and it indicated it expected Cartage to comply with the National Master Freight Agreement. See Respondent Central Exhibit 5.

former D & S employees then working at the Cleveland facility protesting the alternation in their wages, benefits, and seniority when they were employed by Central Cartage as new employees. All grievances filed by employees, Local 964, and Local 407 are being held in abeyance pending the outcome of the instant litigation.

Analysis and Conclusions

A. The Joint Employer Issue

A threshold issue in this case is whether D & S and Central are joint employers. Counsel recognized in their briefs that the test utilized by the Board is set for in NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (C.A. 3, 1982), where the Court describes it, stating (at p. 1124):

> [W]here two or more employers exert significant control over the same employees-where from the evidence can be shown that they share or co-determine those matters governing essential terms and conditions of employment — they constitute "joint employers" within the meaning of the NLRA.

Applying the described test to the facts in this case, I conclude D & S and Central are clearly joint employers.

While the employees performing consolidation work at the Cleveland terminal were employees of D & S on paper, the facts in this case reveal they had minimal contact with the principals of D & S. Starting with the hiring process, the record clearly reveals that D & S's primary function was to place ads for employees in the local newspapers. Cartage has been shown to be the employer which actually hired many of the employees in the complete absence of D & S personnel, and the record reveals that even though D & S personnel, in the form of Rogers or Koubeck, may have screened some applicants by interviewing them, Cartage uniformly had and exercised final authority with respect to the hire of employees at the Cleveland terminal.

Appendix A

During his testimony, Rogers accurately described the contact D & S experienced with employees who were hired and thereafter filed no grievances when he admitted that, other than sending them a paycheck each week, D & S had no contact with the employees. Indeed, the record reveals that once employees were hired Central alone assumed control of their working conditions and their tenure of employment at the facility. Thus, Central scheduled their hours of work, its personnel accomplished the day-to-day supervision of the employees, it decided whether they would be retained or released, it determined whether they had violated the contract or work rules, it determined when they were to be permitted to take vacations or time off, and it determined the pay the would receive by exercising control over the number of hours they worked and by documentation of hours worked.

In sum, it was Central rather than D & S which exercised dominate control over the hire and termination of employees, and it was Central which controlled almost completely the day-to-day incidents of the consolidation employees employment relationship. Standing alone, the degree of control of the employees indicated would warrant a finding that D & S and Central were joint employer. See American Air Filter Co., Inc., 258 NLRB 49 (1981); United Dairy Farmers, Inc., 202 NLRB 23 (1973); and Syufy Enterprises, A Limited Partnership, 201 NLRB 738 (1975). Here, however, a finding of joint employer relationship need not rest solely on the dominance of Central with respect to the day-to-day control it exerted over the employment relationship. Perhaps the two most important terms or conditions of employment from the employee's viewpoint are wages and hours of employment. Here it is undisputed that Central dictated what wage employees would receive. While Rogers, significantly with Garavaglia's assistance, represented D & S in negotiations with the Union, Transport controlled completely the economic package contained in both collective-bargaining agreements which D & S executed. Similarly, it, through Garavaglia's participation in the very first negotiation session, caused D & S to obtain a variance in the normal working hours of Teamster represented

cartage employees to enable it to perform in accordance with General Motors' "just in time" concept.[30] In a very real sense, Central, rather than D & S, determined the wages the consolidation employees received and the number of hours they worked.

While the above-mentioned factors would appear to compel a conclusion that D & S and Central were joint employers during the entire period extending from mid-1982 through 31 May 1986, Respondent contends the relationship changed in time, and that by 31 May 1986 Central and D & S could not be deemed to be joint employees.

Respondent first observes that, during the 1983-1984 period, D & S had a working foreman at the Cleveland facility. The limits of the working foreman authorities are set forth, supra. It is clear the incumbents of the position merely directed employees in the performance of routine work tasks. They were in turn supervised by Cartage management and Cartage's dock supervisors. I conclude the record fails to reveal that they were supervisors within the meaning of Section 2(11) of the Act. The second matter raised by Respondent is the hire by D & S of Lawrence Koubeck. In its brief, Central claims Koubeck was hired to supervise the Cleveland operation and his job was "...to hire, fire, and discipline employees and to adjust their grievances" (brief, p. 15). The difficulty with the contention is simply the fact that the record fails to reveal that Koubeck's employment caused any significant change in the hiring procedure, and the record contains no support whatsoever for the contention that Koubeck supervised the consolidation employees in any way prior to the time that he commenced to exercise very limited control over them in January 1986, by requiring that subsequent to that time they report out of service and into service through him. In all other respects, save situations involving Koubeck's obligation to call in extra employees in accordance with Central's needs, Central retained dominate control over the employees. While the addition of Koubeck

---

[30]As noted, supra, at some point Central reduced its 20-hour workday requirement to 10 hours.

altered the manner in which grievances where handled in that D & S had someone at the Cleveland facility to discuss grievances with Cartage personnel and D & S employees, Central continued to initiate grievances by determining when infractions had been committed, and it retained final authority in disciplinary situations.

In sum, I find Central dominated the employment relationship of the consolidation employees employed at the Cleveland terminal at all times relevant herein. Accordingly, I find, as alleged, that D & S and Central were joint employers of such employees.

B. Appropriateness of Unit and Local 964's Representative Status

Respondent Central's Answer to Complaint places appropriateness of the unit and the Union's representative status in issue. Paragraphs 6 and 7 of the Complaint reveal the unit alleged to be appropriate is:

> All dockmen and yardmen employed by D & S at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Uncontested record evidence reveals the D & S employees covered by the 1982-1985 collective-bargaining agreements with Locals 507 and 964 were those dockmen and yardmen performing automotive consolidation work at Respondent Central's Cleveland terminal. The record fails to reveal that the scope of the unit represented by Local 964 was altered by the 1985-1988 agreement. Noting the record reveals that employees in the described unit worked at the same location, performed essentially the same job functions, received essentially the same pay and benefits, and experienced common supervision, I find the unit to be appropriate.

During the hearing, Respondent Central sought to dispute Local 964's representative status by adducing evidence to show that Local 507 did not represent a majority of the D & S employees when recognition was first extended to that Union in 1982. Objection to that line of inquiry was sustained. I reaffirm the ruling noting that the Board held in Cauthorne Trucking, 256 NLRB 720, 722 (1981): "It is well settled that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relationship was unlawfully established." Here, the record reveals D & S and Local 964 are signatory to a subsisting collective bargaining, lawful on its face, which defines the wages, hours, and conditions of employment of employees in the Cleveland bargaining unit. Such facts raise an irrebuttable presumption that the Union's majority status continues through the end of the contract. Rish Equipment Company, 173 NLRB 943 (1968), enfd. 407 F.2d 1098 (4th Cir., 1969).

C. The Bargaining Obligation

The next issue to be resolved is whether Central was obligated to bargain with Local 964 in the circumstances presented here. The Board has uniformly held that joint employer status gives rise to an obligation to bargain with the representative of involved employees over the decision and effects of displacing unit employees. Sun Maid Growers of California, 239 NLRB 346 (1978), and American Air Filter Co., Inc., 258 NLRB 49 (1981). Respondent Central contends no bargaining obligation exists in the instant case because the Teamsters were fully aware of the relationship between D & S and Central, and the Union's failure to seek to make Central a party to the 1985-1988 D & S contract with the four (4) local unions named, supra, should cause me to conclude Local 964 is estopped from seeking bargaining now. Alaska Roughnecks & Drillers Association v. NLRB, 555 F.2d 732 (C.A. 9, 1977), is cited to support the contention. Respondent Central's reliance upon Alaska Roughnecks is misplaced. In that case, the Court refused to enforce a

Board order against Mobile Oil Corporation, which the Board had found to be a joint employer with a personnel leasing company (Santa Fe), because during a proximate representation proceeding Mobile had not been named as an employer and had not participated in the representation hearing. Pointing to the Board's Rules and Regulations, the Court found Mobile had not been afforded its right of due process.

In the instant case, there have been no representation proceedings and Alaska Roughnecks is clearly inapplicable. While the record does reveal that neither Local 964 nor the International Union demanded at any time that Central become a party to the agreement applicable to the D & S employees working at the Cleveland terminal, it similarly fails to reveal the named labor organizations were fully cognizant of the joint employer relationship which existed between D & S and Central. Having exercised significant control over the terms and conditions of employment of employees performing consolidation work at its Cleveland terminal, Respondent Central exposed itself to the normal joint-employer bargaining obligation.[31]

D. The Waiver and Information Issues

The next issue to be resolved is whether Local 964 waived its right to bargain about the transition from D & S to a Central employed work force.

Respondent Central contends the record reveals Local 964 was supplied with information it sought in its letter of 16 May well before 2 June and its failure to demand bargaining concerning the transition until it had been effectuated reveals it waived its

---

[31]General Counsel and Charging Party contend Central is bound by the most recent collective-bargaining agreement executed by D & S. I find the contention to be without merit. As noted, supra, the contract covered employees working for D & S at other locations which were within the jurisdiction of other local unions. No evidence was offered with respect to employees who worked at other than Central's Cleveland terminal. In the circumstances described, I am unwilling to find that a nonsignatory employer is bound by the agreement.

right to bargaining concerning the matter. In the alternative, Respondent Central contends that, by supplying the Union with information prior to 2 June, it satisfied any bargaining obligation which existed. General Counsel and Charging Party anticipated Central's waiver argument. They contend in their briefs that Central concealed its intention not to retain the D & S employees working at the Cleveland terminal, and, instead, presented Local 964 with a *fait accompli* at the time the transition was effectuated.

It is well settled that where a proposed change in an employer's business operation constitutes a mandatory subject of bargaining, the employer is obligated to give the representative of his employees notice of the intended change and an opportunity to bargain concerning it.[32] Royal Typewriter Company, 209 NLRB 1006 (1974), enfd. 533 F.2d 1030 (8th Cir., 1976); Westinghouse Electric Corporation, 150 NLRB 1574 (1965). Waiver of bargaining rights must be expressed clearly and unmistakably. Rockwell International Corporation, 260 NLRB 1346 (1982); N.L. Industries, Inc., 220 NLRB 41, 43 (1975), enfd. 536 F.2d 786 (8th Cir., 1976). As observed by General Counsel in his brief (p. 18), the Board does not require a request for bargaining by a union where such a request would be futile,[33] or where the union was presented with a *fait accompli*.[34] However, if a union is given adequate notice of an employer's intended actions, but fails to request bargaining, a waiver of its right to bargaining will be found. U.S. Lingerie Corporation, 170 NLRB 1750 (1968).

---

[32]I find, infra, that Central's primary reason for effectuating the transition was its desire to reduce labor costs. Under the rationale expressed in Otis Elevator Co., 269 NLRB 891 (1984), bargaining with Local 964 was legally required.

[33]Richard Chemical Company, Allied Kelite Products Division, 222 NLRB, 5, 6 (1976).

[34]National Car Rental Systems, Inc., 252 NLRB 159 (1970); J-B Enterprises, Inc., 237 NLRB 383 (1978).

Appendix A

Respondent Central urges me to resolve the issue raised by its contention that Local 964 waived its right to bargaining concerning the transition and/or the issue raised by its contention that it satisfied its obligation to give the Union notice of the intended transition by viewing in isolation the testimony given by Silverwood. In my view, the entire chronology of events during the period extending from January 1986 through 31 May 1986 must be examined to resolve the issues raised.

As noted, supra, the record clearly reveals Central was not satisfied with the manner in which D & S was performing in early 1986. In an attempt to remedy the situation, it, inter alia, informed D & S it would be required to take action to assure that it had an adequate number of employees at the Cleveland facility. Shortly thereafter, Central management met and decided Cartage would accomplish the work at the Cleveland terminal at lesser cost than was being incurred by using D & S. In early May, the decision to replace D & S with Cartage employees was implemented. Goryl's 8 May memo to Cartage president Thomas outlined the plan. At the outset, that plan was to keep 15 of the best D & S employees and hire 30 employees off the street anonymously.[35]

While Central, as a joint employer with D & S, had an obligation to give Local 964 timely notice of its intention to effectuate the transition it had decided upon, and which it had commenced to implement, it gave no such notice. Instead, on 15 May, it placed an ad in a Cleveland newspaper which indicated it was seeking to employ dock workers at union rate at the Cleveland facility. When Local 964 business agent Kelm became aware of the ad, he immediately sent Central and D & S a letter dated 16 May which, inter alia, inquired what effect the hiring of Central Cartage employees to support the Cleveland operation would have on Local 964 bargaining unit employees working at

---

[35]Respondent Central's failure to explain why it desired the employee complement described warrants an inference that it wanted to avoid the bargaining obligations imposed upon a successor employer.

the facility; what contract employees hired would be paid under; and what would constitute the local operation referred to in the newspaper ad. Additionally, Kelm immediately visited the terminal and asked Cartage terminal manager Morrison what was going on. Morrison, who had admittedly been briefed by Goryl early in May with respect to the intended manner in which Central was to effectuate the transition, and had already selected 17 D & S employees who were to be hired by Cartage, falsely told Kelm he knew nothing and the matter as being handled by Thomas. When Kelm thereafter sought to contact Thomas to ascertain the situation, Thomas refused to talk to him. At the described juncture, it is clear that Respondent had clearly failed to give Local 964 timely notice of its intention to effectuate a transition at the Cleveland terminal, and it is clear that it was unlawfully withholding information concerning the intended transition from Local 964.

When Kelm was unable to ascertain what Cartage intended to do at the Cleveland terminal by discussing the matter with Morrison and attempting to contact Thomas, he contacted Silverwood. [36] While Silverwood was apparently unaware of the transition plans when Kelm initially contacted him, he was briefed on the matter by Thomas within the next 2 or 3 days. He admittedly failed to contact Local 964 after he learned what was to occur. Instead, he waited for Kelm to contact him again. When Kelm called a few days later, Silverwood simply told him Cartage was going to hire its own employees and all D & S employees interested in employment would be given applications and would receive interviews. Significantly, at that time, Morrison had already decided he would hire only 17 of the then current D & S employees. Additionally, at or near that time, Berquist had added five D & S employees to the hire list. Morrison and Berquist conducted no interviews before they made their decisions.

---

[36] I do not credit Silverwood's unsubstantiated testimony that Kelm called him to check out a rumor that D & S was being replaced prior to the call which was prompted by the 15 May newspaper ad.

Appendix A

On 20 May, Central management officials interviewed D & S employees employed at the Cleveland terminal who had filed applications. While the record reveals Centra officials decided at some undisclosed time that four D & S employees in addition to the twenty-two (22) chosen by Morrison and Berquist should be hired, no Centra official was called during the hearing to establish that the 20 May interviews led to the selection of the four employees who were hired by Cartage. Similarly, on 28 May, Cartage management interviewed all D & S employees who had filed applications with Cartage. The record reveals the interviews were conducted in summary fashion, and it fails to reveal that the interviews resulted in the hire of D & S employees who had not previously been selected.

It was in the above-described context that Silverwood made inquiries of Cassidy, Bridge, and Suckart concerning Central's contractual obligations immediately before and during the Teamsters' convention in Las Vegas. For the first time, he indicated during those conversations that Cartage intended to pick and choose the D & S employees it intended to hire, and it intended to consider them new hires whose terms and conditions of employment would be determined by the National Master Freight Agreement. Significantly, the record fails to reveal that any of the individuals named were authorized at the time to represent Local 964, and the record fails to reveal that Suckart or Cassidy, Teamster officials, informed any Local 964 representatives they had met with Silverwood.

Silverwood stayed at the Teamster convention from 19 May through 22 May. He testified Kelm telephoned him on Friday, 23 May, or Monday, 26 May to again inquire whether Cartage was going to hire all the D & S employees and whether Local 964 would represent the dock workers who were to be hired by Cartage at the Cleveland terminal. Silverwood claims he told Kelm at that time that Central did not intend to hire all the D & S employees, but all that filed applications would be interviewed. He claims he repeated that while Cartage had a

contract with Local 407 and none with Local 964, it would deal with whichever local shook out of the deal.

Careful review of the record causes me to doubt the reliability of Silverwood's claim that he told Kelm as early as 23 or 26 May that Cartage was not going to hire all the D & S employees. With exception of the alleged 23 or 26 May conversation, Silverwood supplied no dates for his alleged conversations with Kelm. He simply recalled his first "briefing" conversation with Kelm occurred about a week after Kelm called him about the newspaper ad, and the second "briefing" conversation occurred 3 or 4 days later. If his recollection of the time interval between the first two conversations is accurate, the 23 or 26 May date is clearly incorrect.[37] A second evidentiary matter which suggests Local 964 did not become aware that Cartage was not going to take all the D & S employees at the time indicated by Silverwood is that testimony and evidence which reveals the circumstances under which Local 407 prepared a letter protesting the proposed transition on 28 May. In his letter to Silverwood dated 28 May, Theodus, the Local 964 business agent, stated, inter alia: "It is our further understanding that former employees of D & S will now become employees of Central Cartage." Significantly, Theodus testified he obtained the information which led him to prepare the 28 May letter from Local 964 business representative Kelm. If so, it would appear Kelm thought, as late as 28 May, that Cartage intended to hire all the D & S employees.[38] Finally, Silverwood's own testimony casts doubt on his assertion that he told Kelm as early as 26 May that Cartage was not going to hire all of the D & S employees. Thus, Silverwood testified that he was prompted to place his final call to Local 964, prior to final effectuation of the transition plans, when Thomas,

---

[37]The ad appeared on 15 May. Kelm did not call Silverwood about it until at least 16 May. Add a week to 16 May and you get 23 May. Addition of 3 or 4 days places the second briefing conversation as occurring on 26 or 27 May.

[38]Significantly, on 28 May, Central officials interviewed all D & S employees who had filed applications for the second time. The record clearly reveals the interviews were conducted for "show" purposes only.

the Cartage president, contacted him to complain that Kelm was at the facility assuring employees that they would be hired by Cartage. It would seem improbable that Kelm would have been engaging in such conduct if Silverwood had previously informed him Cartage did not intend to hire all of the D & S employees. The record causes me to conclude Local 964 did not learn Cartage was not going to hire all the D & S employees until 28 May or thereafter.

In sum, the record in this case reveals that Respondent Central was motivated, primarily by economic consideration, to decide at some point between February and early May 1986 to terminate its relationship with D & S and perform the dock work and switching at the Cleveland terminal with Cartage employees. It thereafter devised a plan which would assure that it could not be claimed to be a successor employer, and it implemented portions of the plan secretly until 15 May. Thereafter, it carefully concealed details concerning its planned transition from Local 964 by taking applications from all D & S employees working at the facility and assuring Local 964 that all would be interviewed, even though it had already decided which D & S employees were to be hired by Cartage. Simultaneously, although it had decided that all employees hired by Cartage would be treated as new hires under the terms of the National Master Freight Agreement, it led Local 964 to believe that it would be willing to deal with either Local 964 or 407; that representation of the employees would be a jurisdictional matter to be solved by the unions. Finally, at a time when its transition plan had been all but fully implemented, it notified Local 964 it did not intend to take all the D & S employees, and it notified Local 407 that it would recognize it as the representatives of the dock workers and switchers employed by Cartage at the Cleveland terminal and it would abide by the National Master Freight Agreement. In agreement with Counsel for the General Counsel and Charging Party, I find Respondent Central failed to give Local 964 adequate notice of its intention to effectuate the transition at issue herein. I further find that Local 964 was never fully informed

regarding the manner in which the transition was to be effectuated, and that it was faced with a *fait accompli* on 2 June 1986. Any Local 964 request for bargaining in the circumstances described would have been futile. Accordingly, I find, as alleged, that by failing to give Local 964 notice of its decision to effectuate the transition, by failing to afford it an opportunity to bargain about the effect of the decision upon D & S employees, and by unilaterally altering the wages, hours and other terms and conditions of employment of former D & S employees hired by Respondent Cartage on or about 2 June 1986, Respondent Central violated Section 8(a)(1) and (5) of the Act as alleged. I further find that the information requested by Local 964 in its letter dated 16 May was information which was necessary for and relevant to the performance of its function as the bargaining agent of the D & S employees working at the Cleveland terminal. Patently, Respondent Central failed to supply Local 964 with information which would reveal the effect that hiring dock workers would have upon D & S employees and it failed to answer Local 964's inquiry regarding which contract would be followed. By failing to furnish the described information, I find Respondent Central violated Section 8(a)(1) and (5) as alleged.

E. The Alleged Discrimination

Paragraph 9 of the Complaint alleges that Respondent Central laid off or discharged 33 named employees on 31 May 1986 because it believed they would support, assist, or favor Local 964, or because Respondent Central believed they would engage in other union and/or protected activities.

As noted, supra, General Counsel adduced limited evidence in an attempt to show that employees Archie Bailey, the union steward, and Kenneth Meyers, a union committeeman, were not hired by Respondent Central because they held union positions. As noted, supra, that evidence consisted of testimony given by employee Gruszezynski and Meyers, which was to the effect that dock foreman Bowen, Gentry and Imondi told the named

employees Meyers and Bailey were not hired by Respondent Central because they held positions with the Union. While I find, as alleged, that Respondent Central violated Section 8(a)(1) through the statements made by Gentry and Imondi, I, in agreement with Respondent Central, agree the evidence offered fails to prove that Meyers and Bailey were not hired by Respondent Central because they held union positions, because the record clearly reveals that Respondent Central's dock foreman did not participate in the selection of D & S employees who were to be hired by Respondent Central.

Recognizing the fact that the record contains no testimony which reveals that the Central individuals who selected the D & S employees who were to be hired by Central possessed union animus, General Counsel contends Respondent Central's failure to hire the 33 employees named in the Complaint should be found to constitute a violation of Section 8(a)(3) because the record reveals the employees were laid off and refused hire by Cartage pursuant to a plan to avoid the obligations imposed by the 1985-1988 D & S collective-bargaining agreement. I agree.

While Respondent Central claims it decided to effectuate the transition because the International Union told it to get rid of leasing companies, and, in any event, it was dissatisfied with D & S's performance, the record causes me to conclude its primary reason for deciding to effectuate the transition was a desire to escape the obligations imposed upon it and D & S by the then subsisting collective-bargaining agreement with, inter alia, Local 964.

While the record does reveal that International Union officials urged Central to sever its connection with leasing companies, I note the record fails to contain any evidence which would reveal any Teamster official requested that Central sever its relationship with D & S at the Cleveland terminal. To the contrary, the record reveals the employees working at that terminal were covered by a Teamster contract which had expressly been approved by Jackie Presser, chairman of the Teamsters National Freight Industry

Negotiating Committee.[39] In the circumstances, Respondent Central's claim that it was motivated to effectuate the transition from D & S to Cartage by an International Union request that it get rid of leasing companies is not convincing.

Although the record does reveal Central was not satisfied with the manner in which D & S was performing in January 1986, I attach significant weight to Garavaglia's testimony which reveals D & S's performance was not discussed in February or March when Central officials met and decided the work at the Cleveland terminal could be accomplished at lesser costs if Cartage did it. Noting the record clearly reveals the 2 June transition permitted Central to pay many of the same employees $2.00 less per hour for doing the same work they had performed as D & S employees a few days earlier and that other economic advantages flowed from application of the National Master Freight Agreement rather than the D & S paper contract, it is clear, and I find, a major reason for Respondent Central's decision to effectuate the transition was its desire to avoid the obligations imposed upon it as a joint employer by the 1985-1988 D & S collective-bargaining agreement.

In agreement with General Counsel, I find the instant situation to be analogous to the situation which existed in Borg Warner Corporation, 245 NLRB 513 (1979). Here, as there, work was transferred from one company to another to achieve lower labor costs. As noted by Judge Cohn in Borg Warner, the U.S. Supreme Court held in NLRB v. Great Dane Trailers, Inc.,[40] that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if an employer introduces evidence that the conduct was motivated by business considerations." Clearly, by, in effect, causing D & S to terminate

---

[39]See Charging Party Exhibit 1.

[40]388 U.S. 26 (1967).

the employment of the 33 employees named in the Complaint, and refusing to hire them when their work was transferred from D & S to Cartage pursuant to a plan to avoid the obligations imposed on it by the collective-bargaining agreement applicable to those employees, Respondent Central engaged in conduct which was "inherently destructive" of important employee rights. Patently, such conduct discouraged membership in Local 964. Thus, it violated Section 8(a)(1) and (3) of the Act. Borg Warner Corporation, supra. Los Angeles Marine Hardware Co., 253 NLRB 720 (1978).[41]

Conclusions of Law

1. D & S Leasing, Inc., Central Transport, Inc., and Central Cartage Company are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Centra, Inc., Central Transport, Inc., and Central Cartage Company constitute a single employer within the meaning of the Act.

3. Teamsters Local Unions 964, 20, 118, 449, and 407, all affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent D & S and Respondent Central are joint employers of the dockmen and yardmen who performed automotive consolidation work at Respondent Central's Cleveland, Ohio, terminal at times material herein.

5. All dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees

---

[41]In my view, the facts in this case also support a finding of violation of Section 8(a)(3) under the rationale expressed in Mason City Dressed Beef, 231 NLRB 731, 747 (1977), and cases cited therein at fn. 18.

constitutes an appropriate unit for bargaining within the meaning of Section 9(a) of the Act.[42]

6. At all times material herein, Teamsters Local Union 964 has been the exclusive collective-bargaining agent of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

7. By discriminating with respect to the hire or tenure of employment of the employees named below to discourage membership in Local 964, Respondent Central has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

8. By failing to give Local 964 notice of its decision to transfer work from Respondent D & S to Respondent Cartage; failing to afford it an opportunity to bargain about the effect of the decision upon D & S employees; by unilaterally altering the wages, hours, and other terms and conditions of employment of former D & S employees hired by Respondent Cartage; and by failing to furnish Local 964 with requested information regarding the transition which was relevant to its function as the bargaining representative of unit employees, Respondent Central engaged in, and is engaging in, conduct which violates Section 8(a)(5) and (1) of the Act.

9. By informing employees they were not hired by Respondent Cartage because they held positions with Local 964, Respondent engaged in, and is engaging in, conduct which violates Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices have a close, intimate, and substantial effect upon the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

---

[42]Description of unit revised to reflect cancellation of D & S Leasing contract and assumption of automotive consolidation work by Central Cartage Company.

Appendix A

The Remedy[43]

Having found that Respondent Central has engaged in unfair labor practices within the meaning of Section 8(a)(5), (3) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act, including, upon request, to bargain with the Union as the exclusive bargaining representative of unit employees.

I recommend that Respondent Central be ordered to recognize and, upon request, bargain with Teamsters Local Union 964, as the exclusive collective-bargaining representative of the dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees, and, if an agreement is reached, embody such agreement in a signed contract. I further recommend that Respondent Central be ordered to offer the thirty-three (33) employees named in the Complaint immediate reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, discharging, if necessary, employees hired to perform the work such employees previously performed. Finally, I recommend that Respondent Central be ordered to make whole the thirty-three (33) employees named in the Complaint for any loss of wages and benefits they have suffered as a result of the discrimination practiced against them, with interest, and to make whole those former D & S employees hired by Respondent Central on or about 2 June 1986, for any loss wages and benefits, with interest, which they experienced as a result of Respondent Central's unilateral alteration of their wages, hours, and terms or conditions of employment. Backpay shall be calculated in accordance with the formula set forth in

---

[43]As General Counsel indicated at the outset of the hearing that no monetary remedy was sought against Respondent D & S, and the record reveals that D & S is now a defunct corporation, the remedy and order herein will apply to Respondent Central only.

F. W. Woolworth Company, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in New Horizon For The Retarded, Inc., 283 NLRB No. 181 (28 May 1987).[44]

Finally, while General Counsel requests that a "visitorial clause" be included in any order issued in this case, I note the Board has declined to include such clauses in cases which do not appear to pose complicated compliance problems. See, for example, Cherokee Heating and Air Conditioning Co., 278 NLRB No. 44 (1986). In my view, the order in this case will pose no significant compliance problems, and provisions set forth in the order which require the Respondent to preserve and make available to the Board described records necessary to analyze the amount of backpay will suffice.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:[45]

Order

Central, Inc., Central Transport, Inc., and Central Cartage Company, a single employer, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Teamsters Local Union No. 964, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers concerning the effects of transfer of automotive consolidation work at its Cleveland, Ohio, terminal from D & S Leasing, Inc. to Central Cartage Company.

(b) Altering the wages, hours, or other conditions of employment of employees in the bargaining unit found to be

---

[44]See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

[45]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

appropriate in Conclusion of Law 5, above, without the express agreement of the above-mentioned Union.

(c) Refusing to supply Teamsters Local Union No. 964 requested information, which is necessary for and relevant to its performance as the exclusive bargaining agent of bargaining unit employees.

(d) Discouraging membership in Teamsters Local Union No. 964 by refusing to hire employees pursuant to a plan to avoid the obligations of a subsisting collective-bargaining agreement.

(e) Coercing employees by informing them they were not hired because they held positions with Teamsters Local Union No. 964.

(f) In any like or related manner, interfering with, coercing, or restraining employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the above-named Union as the exclusive representative of employees in the appropriate unit described below, and, if agreement is reached, embody it in a signed written agreement.

> All dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Offer the employees named below, who were refused hire by Central Cartage Company as a result of our unlawful action, immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employee hired to

replace them, and make them whole for any loss of pay or benefits suffered as a result of the discrimination against them in the manner set forth above in the section entitled "The Remedy."

Donald Gruszezynski
Robert Murphy
Robert Jolluck
Greg Henry
Clark Kinney
Barry Peters
Archer Bailey III
Daniel Kenyon
Joseph Starlovic
Robert Poczontek
Ron Nougsel
Robert Grabinski
Ben Pepera
Richard Miller
Mick Ochal
Bob Banta
Charles Craig
John Hennessey
Roger Yeaman
Kenneth Meyers
Nick Kaurich
James Kelly
Kenneth Glenn
Kenneth Ford
James Fargo
Larry Gardner
Tom Christine
James Brewster
Douglas Turchank
Joe Prince
Jack Mullroy
Doug Jedlinsky

Appendix A

Bob Elsworth

(c) Make whole those former D & S Leasing, Inc. employees hired by Central Cartage Company on or about 2 June 1986, for any loss of pay or benefits which would have accrued to them under the 1985-1988 D & S-Local 964 bargaining agreement but for the failure to apply the terms of that agreement to all employees employed in the aforesaid bargaining unit.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Cleveland, Ohio, facility copies of the attached notice marked "Appendix."[46] Copies of said notice on forms provided by the Regional Director for Region 8,

---

[46]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively in good faith with Teamsters Local Union No. 964, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers concerning the effects of transfer of automotive consolidation work at our Cleveland, Ohio, terminal from D & S Leasing, Inc. to Central Cartage Company.

WE WILL NOT alter the wages, hours, or other conditions of employment of employees in the bargaining unit found to be appropriate in Conclusion of Law 5, above, without the express agreement of the above-mentioned Union.

Appendix A

WE WILL NOT refuse to supply Teamsters Local Union No. 964 requested information, which is necessary for and relevant to its performance as the exclusive bargaining agent of bargaining unit employees.

WE WILL NOT discourage membership in Teamsters Local Union No. 964 by refusing to hire employees pursuant to a plan to avoid the obligations of a subsisting collective-bargaining agreement.

WE WILL NOT coerce employees by informing them were not hired because they held positions with Teamsters Local Union No. 964.

WE WILL NOT in any like or related manner, interfere with, coerce or restrain our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with the above-named Union as the exclusive representative of our employees in the appropriate unit described below, and, if agreement is reached, embody it in a signed written agreement.

> All dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL offer the employees named below, who were refused hire by Central Cartage Company as a result of our unlawful action, immediate and full reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employee hired to replace them, and make them whole for any loss of pay or benefits suffered as a result of the discrimination against them in the manner set forth above in the section entitled "The Remedy."

Donald Gruszezynski
Robert Murphy
Robert Jolluck
Greg Henry
Clark Kinney
Barry Peters
Archer Bailey III
Daniel Kenyon
Joseph Starlovic
Robert Poczontek
Ron Nougsel
Robert Grabinski
Ben Pepera
Richard Miller
Mick Ochal
Bob Banta
Charles Craig
John Hennessey

after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 8, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington D.C., 31 August 1987

Donald R. Holley
Administrative Law Judge

Roger Yeaman
Kenneth Meyers
Nick Kaurich
James Kelly
Kenneth Glenn
Kenneth Ford
James Fargo
Larry Gardner
Tom Christine
James Brewster
Douglas Turchank
Joe Prince
Jack Mullroy
Doug Jedlinsky
Bob Elsworth

WE WILL make whole those former D & S Leasing, Inc. employees hired by Central Cartage Company on or about 2 June 1986, for any loss of pay or benefits which would have accrued to them under the 1985-1988 D & S-Local 964 bargaining agreement but for the failure to apply the terms of that agreement to all employees employed in the aforesaid bargaining unit.

CENTRA, INC., CENTRAL TRANSPORT, INC. AND CENTRAL CARTAGE COMPANY, A Single Employer (Employer)

National Labor Relations Board (N.L.R.B.)
299 NLRB 658, 299 NLRB No. 97, 135 L.R.R.M (BNA) 1230,
1990 WL 140099 (N.L.R.B.)

APPENDIX B

Decision and Order of
National Labor Relations Board
August 31, 1990

Appendix B

APPENDIX B

D & S Leasing, Inc.; Central Transport, Inc.
and Central Cartage Company
and
Archer Bailey III, an Individual

Teamsters Local Union No. 964 Affiliated with
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America, AFL-CIO[1]

Case 8-CA-19212
Case 8-CA-19282

Dated, Washington, D.C. August 31, 1990

DECISION AND ORDER

On August 31, 1987, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent Central[2] filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a brief in support of cross-exceptions, and an answering brief. Local 964 also filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's cross-exceptions.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

---

[1]On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2]"Central" denotes Central Transport, Central Cartage, and Centra, Inc. collectively. "Transport" and "Cartage" denote Central Transport and Central Cartage respectively. The "Respondent" refers collectively to the named Respondents found to be a single employer.

[3]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Appendix B

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order, as modified and set forth in full below.[4]

The complaint alleges 8(a)(1), (3), and (5) violations stemming from the Respondent's cancellation of its contract with D & S Leasing, Inc. (D&S), a personnel leasing firm, and the subsequent layoff and refusal to recall employees jointly employed by the Respondent and D&S at the Respondent's Cleveland terminal. At all relevant times prior to and including the events at issue, Cartage and Transport were wholly owned subsidiaries of Centra and all three Corporations were headquartered in the same building in Sterling Heights, Michigan. T.S. Maroun and his four children owned all the Centra stock. The composition of the board of directors of each Corporation was essentially the same, except Robert Goodheart, the president of Transport, sat only on that board of directors and Larry Thomas, the president of Cartage, sat only on its board of directors. Ron Leach was executive vice president of both Transport and Cartage and Charles Garavaglia was vice president for labor relations for both Transport and Cartage before his dismissal in April 1986. At some point not specified in the record, Garavaglia hired Richard Silverwood and Hank Richard to handle labor relations for Cartage and Transport respectively. We agree with the judge's conclusion that at all times relevant Centra, Transport and Cartage constituted a single employer (Central).

---

[4]The General Counsel excepts to the judge's failure to grant a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order, Under the circumstances of this case we find that such a clause is unwarranted. Accordingly, we deny the General Counsel's request that a visitatorial clause be included in the Order. See Cherokee Marine Terminal, 287 NLRB 1080 (1988).

Appendix B

Transport was an over-the-road hauler, and Cartage performed local breakdown and delivery work at its Cleveland terminal, the only Cartage facility at issue here. Transport's drivers delivered goods to Cartage's Cleveland facility, where Cartage's dockworkers broke down the shipments and consolidated them for local delivery. the Cartage dockworkers at the Cleveland facility were represented by Truck Driver Union Local 407, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters Local 407, Party in Interest) under the Teamsters National Master Freight Agreement (NMFA).

In mid-1982, Transport won an automotive consolidation contract from General Motors Corporation. The consolidation work was to be done in Cleveland. Central decided that Transport should perform the consolidation work and arranged for Transport to lease a dock at Cartage's facility for that purpose. Although Cartage employees usually performed the breakdown and consolidation work at Cartage's docks, Central decided to hire personnel through D&S to perform Transport's work.

In early 1982, George Rogers, the president of D&S, signed a contract to supply drivers to Transport. The drivers were represented by Teamsters Local 507. D&S contract with Local 507 was not under the NMFA but was a "white paper" or "paperback" agreement. Under the terms of the contract, D&S employees were paid at a lower rate than they would have been under the NMFA. When Transport won the contract for the General Motors work and Central contracted with D&S to supply the personnel to perform the dockwork, an addendum was added to the "white paper" agreement between D&S and Local 507 to include the dockworkers under its coverage.[5]

---

[5]In late 1982, Local 964 replaced Local 507 as the representative of these employees. The D&S agreement with Local 964 ran from 1982 to 1985 and incorporated the same terms as D&S's agreement with Local 507. In 1985, D&S and Teamsters Local 964 executed a new agreement effective June 1, 1985, through March 31, 1988. Unlike the prior agreement, the new contract also covered D&S employees working in jurisdictions

Appendix B

Although D&S supplied the personnel to work at the Transport dock, it is clear from the record that Cartage supervisors directed the D&S personnel in their day-to-day activities. Bruce Morrison, Cartage's terminal manager, Jim Berquist, Cartage's operations manager, and Cartage's dock foremen Wayne Gentry and John Smith gave D&S employees their work assignments, scheduled their working hours, approved requests for time off, and assigned men to train newly hired employees. In addition, Morrison testified that his approval was necessary before D&S could hire individuals to work at the dock and that he sometimes hired employees and placed them on the D&S payroll without consulting Rogers. Morrison, Berquist, Gentry and Smith, whom the judge found to be supervisors and agents of Transport and Cartage, also had the authority to discipline and terminate D&S personnel. Hence, we agree with the judge that at all times relevant Central personnel controlled the day-to-day activities of the D&S employees, and that at all times relevant Central and D&S were the joint employers of the dockmen who performed consolidation work for Transport at the Cleveland facility and who were represented by Local 964.

In early 1986, Central decided to terminate its relationship with D&S and to have its own employees perform the consolidation work. Pursuant to this decision, Joe Goryl, a Central official, instructed Morrison to make up a list of D&S personnel whom Central should hire when it took over the Cleveland dock. Morrison testified that on the basis of his own judgment, and without consulting the supervisors involved in the daily operations at the dock, he made up a list of 17 "superstars" and submitted it to Goryl. In a memo dated May 8, 1986, Goryl informed Thomas, Cartage's president, that Central would keep approximately 15 D&S personnel[6] and would hire 30 new employees "anonymously."

---

other than that of Local 964. The employees represented by those other locals are not at issue here.

[6]When Berquist returned from vacation the following week, he added five names to Morrison's list. Central officials added an additional four. Consequently, when Central

Appendix B

Following Goryl's instructions, Morrison placed an ad for new employees in a local newspaper on May 15, 1986. The ad specified only that new employees would work for Cartage. When the president of Local 964, Oswald Kelm, called Morrison to find out what was going on, Morrison told him that he did not know about the ad and had nothing to do with it. On May 16, 1986, Kelm sent Morrison a registered letter requesting clarification of the ad. This letter was never answered.

Central treated all employees hired as of June 2, regardless of whether they had previously worked for D&S, as new employees who came under the NMFA contract between Cartage and Local 407, including its wage terms.[7] Under the terms of that agreement, the pay of newly hired employees was prorated to that of employees making the full amount of wages established under the NMFA contract. Thus, new employees were paid 70 percent of the contract wage their first year, 80 percent their second year, etc. Consequently, former D&S personnel, who had worked for Transport under the "white paper" agreement with Local 964 on May 31, were paid approximately $2 less an hour when they returned to work on June 2 as "new" Cartage employees working under the NMFA contract with Local 407. In addition, these former D&S employees lost their seniority and the health and welfare benefits that they had accrued under the "white paper" agreement.

---

terminated its contract with D&S on May 31, 1986, Central retained 26 of the D&S personnel.

[7]Several former D&S employees testified that they first learned that Cartage was hiring dockmen by reading Cartage's newspaper advertisement. Although there were "rumors flying around," these former D&S employees testified further that although they were requested by Central officials in late May to file applications and were given interviews of approximately 3-5 minutes' duration, they did not learn until May 31 at the earliest that D&S contract had been cancelled and that they would be terminated. For example, former D&S employee Towson testified without contradiction that Koubeck, D&S's vice president, informed him on Saturday, May 31, that he no longer worked for D&S and that he should not report to work on Monday unless Central notified him to do so. On Sunday, June 1, Berquist called Towson and told him to report to work on Monday, June 2. Only after he reported on Monday did Towson learn that Central intended to treat him as a new employee and that he had lost his seniority.

Appendix B

We agree with the judge that Central terminated its contract with D&S, thereby causing D&S to lay off 33 employees, and that Central refused to hire these employees as part of a plan to escape from its obligations under the collective-bargaining agreement. We also agree with the judge that by these actions Central engaged in conduct that was inherently destructive of these employees' rights guaranteed under Section 7 of the Act. In addition, for the reasons explained below, we also find that Central's actions in this regard were motivated by antiunion animus under the analysis set out in Wright-Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Because we find that Central's decision to terminate the unit employees was motivated by antiunion animus, we conclude that Central was obligated to bargain with the Union over its decision to terminate its contract with D&S and the effects of that decision.[8] Thus, we find that Central, was the joint employer of the D&S employees, violated Section 8(a)(5) and (1) of the Act by failing to bargain with Local 964 over its decision to terminate its contract with D&S and the effects of that decision.[9] In addition, we agree with the judge that Central

---

[8]See First National Maintenance Corp. v. NLRB, 452 U.S. 666, 682, 687-688 (1981); Strawsine Mfg. Co., 280 NLRB 553, 553 (9186), and Hydro Logistics, Inc., 287 NLRB 602, 602 (1987).

[9]We agree with the judge that the Respondent, as the joint employer of the D&S personnel, "exposed itself to the normal joint-employer bargaining obligations." We also agree with the judge that the Board has "uniformly held" that a joint employer is obligated to bargain with the union over the decision and effects of displacing unit employees. See Sun-Maid Growers of California, 239 NLRB 346 (1978), enfd. 618 F.2d 56 (9th Cir. 1980), and W.W. Grainger, Inc., 286 NLRB 94 (1987), enf. denied on other grounds 860 F.2d 244 (7th Cir. 1988). Inexplicably, however, the judge failed to find that Respondent violated Sec. 8(a)(5) and (1) of the Act through its failure to bargain with Local 964 over its decision to terminate its contract with D&S. Consequently, the judge limited his recommended Order to a provision that the Respondent bargain with Local 964 only over the effects of its decision to terminate its contract with D&S. The judge has, however, made all of the factual findings that would establish the legal conclusion concerning a decision bargaining violation, and his reasoning concerning the Respondent's bargaining obligation makes it appear that the omission of that formal conclusion was inadvertent. We shall therefore include in our Order a provision that the Respondent bargain with Local 964 over its decision to terminate its contract with D&S.

In the absence of exceptions, Member Cracraft would not find this additional 8(a)(5) violation.

violated Section 8(a)(5) and (1) by failing to provide Local 964 with notice of its decision and to provide information requested by Kelm, Local 964's president.[10]

We also agree with the judge that, in the circumstances of this case, the Respondent has an obligation to recognize and bargain with Local 964 and to embody the results of that bargaining in a contract if agreement is reached. In this regard, we have found that Central in the form of its single employer Transport was the joint employer of D&S employees. When Transport terminated its contract with D&S, these employees were terminated but a majority of them were then "hired" 2 days later by Cartage which we have found is also a single employer with Central.[11] Indeed, there was no bona fide cessation of operations at the Cartage terminal and no real break in the bargaining relationship between Central and Local 964. Hence, although D&S was removed from the scene, Central remained the Employer of a majority of the unit employees who were essentially doing the same job in the same location under the same supervision and ultimately for the same corporate entity. Accordingly, Central was not free to set new terms and conditions of employment without bargaining with Local 964 but had a duty to maintain the status quo until it either reached agreement with Local 964 or bargained to impasse.[12]

---

[10]In its exceptions, the Respondent asserts that Local 964 waived its right to bargain about the transition from D&S to a Cartage-employed work force by its failure timely to request negotiations. We agree with the judge that the Respondent ignored Local 964's timely requests for information and that the Respondent failed to give Local 964 adequate notice of its decision. Particularly because Local 964 was presented with a fait accompli, we find that it did not waive its bargaining rights.

[11]In this regard, the judge stated "that at or about the same time" that Cartage employed the 26 former D&S personnel, it hired 32 new non-D&S employees. G.C. Exh. 39, however, makes clear that Cartage had hired only 24 non D&S employees as of June 2, the date it took over the Transport/D&S work. Consequently, the record clearly establishes that Cartage commenced work on June 2 with a majority of former D&S employees in the new unit.

[12]See Sterling Processing Corp., 291 NLRB No. 30 (Sept. 30, 1988), and Morton Development Corp., 299 NLRB No. 94, issued this day. Inasmuch as Central was not a signatory to D&S's contract with Local 964 and the record does not otherwise establish

Appendix B

The complaint further alleges that Central violated Section 8(a)(3) and (1) of the Act by laying off and/or discharging 33 named employees and by failing and refusing to employ and/or recall those employees because Central believed that they had or would support Local 964. Although finding no evidence of antiunion animus, the judge found that Central Caused D&S to terminate the Local 964-represented employees and transferred the unit work to Cartage as part of a plan to avoid its obligations under the 1985-1988 D&S collective bargaining agreement that it incurred by virtue of Central's status as D&S's joint employer of the Local 964-represented employees. The judge concluded that Central's actions in this regard, its termination of the Local 964-represented employees and its refusal to rehire some of them, were "inherently destructive" of the employees' Section 7 rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967), and thus violated Section 8(a)(3) and (1) of the Act. We agree.

In Great Dane Trailers, the Supreme Court stated that some conduct:

> is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive.... [Such conduct] carried with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent."

---

that Central should be bound to that agreement, in the circumstances of this case we find that Central is not bound to the contract as such. As stated above, however, it is bound to maintain the status quo as reflected, inter alia, in the contract with Local 964 until it bargains to agreement or impasse.

The Respondent excepts to the portion of the judge's recommended Order prohibiting the Respondent from altering the terms and conditions of employment without express agreement of the Union. In this regard, the recommended Order is inconsistent with our conclusion that the Respondent must maintain the status quo only until it bargains to agreement or impasse. We shall include an appropriate provision in our Order.

The Court further stated:

> if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.

With regard to what conduct may be characterized as "inherently destructive," we have described such conduct as the type "which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights." Swift Independent Corp., 289 NLRB No. 51, slip op. at 18 (June 29, 1988), remanded sub nom. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

Here, in furtherance of its plan to reduce labor costs, Central not only caused D&S to terminate these employees but at the same time caused Transport, D&S's joint employer, to terminate these same employees as part of its plan to transfer the work to Cartage in order to bring the unit work under the NMFA administered by Local 407. As noted, supra, new hires received only 70 percent of the full wage rate under the NMFA. Thus, under the guise of hiring as new Cartage employees those terminated by Transport, Central was able to pay those employees $2 less an hour on Monday, June 2, than they earned on the previous Saturday, May 31.

In this regard, we find that Central's conduct in these circumstances is analogous to that of an employer that carries out a sham closing of a facility in order to reopen under new terms and conditions of employment more favorable to itself. By "closing" (with respect to unit work) Transport on Saturday, May 31, and "opening" Cartage on Monday, June 2, Central was able to employ as "new hires" the former Local 964-represented employees at approximately $2 less an hour than they were making on

May 31 when they were represented by Local 964. Within the context of sham closing, we have stated that:

> The closing of the plants, the termination of the employees, and...the rehiring of those employees "as new employees of the corporation" under new terms and conditions of employment must be considered conduct that would naturally hinder collective bargaining and as conduct inherently destructive of employee rights. [Swift Independent Corp., supra, slip op. at 20.]

We find this language no less applicable in the present context where a single employer, Central, transferred work from one of its companies to another with the sole purpose of ridding itself of one bargaining agent, Local 964, and replacing it with another, Local 407, which represented employees under a contract whose terms were more favorable to Central. Accordingly, we conclude that by such action Central engaged in conduct "inherently destructive" of employees' rights in violation of Section 8(a)(3) and (1) of the Act.[13]

We further find, contrary to the judge, that there is sufficient evidence in the record to support a conclusion that Central's actions in laying off and refusing to recall unit employees were motivated by antiunion animus in fact and were thus violative of Section 8(a)(3) and (1) under a Wright Line analysis.[14]

---

[13]Having found that the Respondent engaged in conduct inherently destructive of employees' Sec. 7 rights, under Great Dane the burden shifts to the Respondent to establish that it was motivated by "legitimate objectives." 388 U.S. at 34. We find that the Respondent has failed to satisfy its burden. See the discussion in the last two paragraphs of text, infra.

Because, as explained below, the record supports a finding of actual antiunion motive in the termination of the D&S employees and their subsequent treatment by Central (refusing to rehire some of them and hiring others as "new" employees), Chairman Stephens finds it unnecessary to make an "inherently destructive" finding pursuant to the analysis set out in Great Dane, supra at 33-34. See his separate position in Swift Independent Corp., supra, slip op. at 23 fn. 19.

[14]"It is, of course, well established that a discharge may be for a good cause or bad cause, or no cause at all except that a discharge is unlawful when the real motivating

Appendix B

In Wright Line, supra, 251 NLRB 1083, the board established a two-part causation test in cases alleging violations of Section 8(a)(3) turning on employer motivation. Under the Wright Line analysis, the General Counsel has the initial burden of establishing a prima facie showing that protected activity was a "motivating factor" in the employer's decision. Once the General Counsel has met this burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

Applying the Wright Line analysis to the facts of the present case, we find that the General Counsel has met the burden of establishing a prima facie showing that Central laid off the Local 964-represented employees and refused to recall some of them as part of an attempt to evade its obligations under the more costly collective-bargaining agreement between D&S and Local 964, freeing itself from its bargaining obligation with Local 964, and replacing Local 964 with Local 407 as the representative of the employees performing the unit work formerly done by Local 964-represented employees. In this regard, the inference is inescapable that the Respondent proceeded with its plan under the apprehension that its failure to retain all the unit employees and its rehiring of some of the unit employees by a different entity, somehow entitled it to abandon its relationship with Local 964 in favor of Local 407. In reaching this determination we note that Silverwood, the labor representative for Cartage, sought out Teamsters officials in May 1986, only 2 weeks before the transfer and layoff were to take effect, and sought assurances from them that Cartage was not obligated to take the laid-off employees when it terminated its relationship with D&S. In addition, Central attempted to circumvent the bargaining process through its efforts to keep its plan secret from Local 964 and its refusal to supply the information requested pertaining to the

---

purpose is contrary to the prohibitions of Section 8(a)(1) or (3) of the Act." W.W. Grainger, Inc., supra at 116.

transfer.[15] Further, and perhaps most significantly, the Respondent has failed to provide specific reasons for its selection of any of the particular 33 Local 964-represented employees who were laid off.[16]

Finally, with regard to the General Counsel's prima facie case, although we agree with the judge that Central violated Section 8(a)(1) through statements made by Supervisors Wayne Gentry and Joe Imondi to employee Meyers,[17] we also find, contrary to the judge, that these statements provide further evidence of the Respondent's motive for laying off former D&S employees. Although the judge emphasized the fact that neither Gentry nor Imondi participated in the decision to lay off the unit employees, we note that both Gentry and Imondi had worked for Cartage for some time and were in a position to know the reasons for Central's action although they did not participate in the hiring process itself.[18] Consequently, although Gentry and Imondi may not have been involved in the decision, they were in a position, at the least, to note the lack of legitimate reason for the Respondent's hiring practices. In these circumstances, we conclude that these statements, although not dispositive, have some relevance

---

[15]See Cedar Falls Health Care Center, 276 NLRB 1300, 1302 (1985).

[16]Terminal Manager Morrison testified that he evaluated each employee "in his head." He did not consult the supervisors who had daily contact with the men and could not articulate any definite standard by which employees were evaluated for selection. He stated only that he wanted to keep the "superstars." Further, the record shows no difference between the employees retained and those laid off with regard to reprimands or disciplinary actions. The inability to articulate a definite standard by which employees were evaluated permits the inference that Central's true motive in the hiring process was discriminatory. See Wright Line, supra at fn. 12. See also Lemay Caring Center, 280 NLRB 60, 70 (1986).

[17]According to Operations Bulk Manager Gentry's credited testimony on June 1, 1986, he told Union Committeeman Meyers that he had always been satisfied with his work and could not understand why he was not coming back and that the only reason he could think of was Meyers' association with the Union. On the same day, according to Meyers' credited testimony, Dock foreman Imondi told Meyers that he and Union Steward Archie Bailey were not coming back because they were with the Union.

[18]Gentry has been operations bulk manager for Central since 1985. Imondi commenced work for Central on June 25, 1985. He performed "clerical duties" prior to his promotion to dock foreman when Central took over the dock on June 2, 1986.

and are entitled to some weight in assessing Central's state of mind with respect to the discharge of employees Meyers and Bailey.[19]

Central argues in rebuttal to the prima facie case that its decision to lay off the employees was a part of its plan to terminate its contract with D&S primarily because of its dissatisfaction with D&S's performance and because of what its contends was the International's insistence that Central not contract with leasing companies. As evidence of the former, Central introduced into evidence the letter of January 20, 1986, from Cartage's president, Thomas, to D&S's president, Rogers, which outlined Central's dissatisfaction with D&S's performance and threatened termination of the contract unless D&S's performance improved. With regard to the International's views on leasing, Union Office Brown testified that in a spring 1986 meeting with Central representatives in Washington, D.C., officials of the Teamsters International expressed their dissatisfaction with leasing companies.

We find, however, that these preferred reasons are not sufficient to overcome the evidence presented by the General Counsel. We note that Rogers, D&S's president, testified without contradiction that after receiving Central's letter of January 20, Koubeck, D&S's vice president, took steps to remedy the problems outlined by Central and there is no evidence that Central was further dissatisfied with D&S. Second, Garavaglia testified that at a meting of Central management officials in February or March 1986, labor costs was the sole issue discussed in making the decision to terminate the D&S contract. As to the International's dissatisfaction with employee leasing companies, we note first that the International officials expressed their dissatisfaction in general terms. They did not specifically urge Central to terminate its contract with D&S but spoke generally of companies that used leasing companies as a way to get around union

---

[19]Thriftway Supermarket, 276 NLRB 1450, 1463 (1985). See also Burger King Corp., 279 NLRB 227, 239 (1986).

standards. In this regard, we note that Silverwood testified that the Teamsters did not have a problem with Central's use of D&S because D&S, unlike most employee leasing companies, was unionized. We also note that Central continued to contract with employee leasing companies after it terminated its contract with D&S. Thus, we find that Central has failed to rebut the General Counsel's prima facie case and that Central's actions in laying off and refusing to recall Local 964-represented employees were motivated by antiunion animus. We, therefore, conclude that the Respondent violated Section 8(a)(3) and (1) of the Act.[20]

ORDER

The National Labor Relations Board orders that the Respondents, Centra, Inc., Central Transport, Inc., and Central Cartage Company, a single employer, Sterling Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with Teamsters Local Union No. 964, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO by refusing to recognize and bargain with the Union in the appropriate unit and by refusing to bargain with the Union concerning its decision to cancel its contract by D&S Leasing, Inc., and concerning the effects of the transfer of automotive consolidation work at its Cleveland, Ohio terminal from D&S Leasing, Inc. to Central Cartage Company.

(b) Altering the wages, hours, or other conditions of employment of employees in the appropriate bargaining unit without bargaining with the above-named Union.

---

[20] 283 NLRB 1173 (1987).

(c) Refusing to supply Teamsters Local Union No. 964 requested information, which is necessary for and relevant to its performance as the exclusive bargaining representative of the unit employees.

(d) Discouraging membership in Teamsters Local Union No. 964 by laying off and refusing to recall employees pursuant to a plan to avoid the obligations of a subsisting collective-bargaining agreement.

(e) Coercing employees by informing them they were not hired because they held positions with Teamsters Local Union No. 964.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the above-named Union as the exclusive representative of the employees in the following appropriate unit and, if agreement is reached, embody it in a signed written agreement.

All dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Bargain collectively, on request, with the Union concerning its decision to cancel its contract with D&S Leasing, Inc. and concerning the effects of the transfer of automotive consolidation work at its Cleveland, Ohio terminal from D&S Leasing, Inc. to Central Cartage Company.

(c) Furnish the Union with any and all information requested by it that is necessary for and relevant to its

performance as the exclusive bargaining representative of the unit employees.

(d) Offer the employees named below, who were refused hire by Central Cartage Company as a result of its unlawful action, immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, previously enjoyed, dismissing, if necessary, any employee hired to replace them, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision:

Robert Murphy
Greg Henry
Clark Kinney
Barry Peters
Archer Bailey III
Daniel Kenyon
Joseph Starlovic
Robert Poczontek
Ron Nougsel
Robert Grabinski
Ben Pepera
Richard Miller
Mick Ochal
Bob Banta
Charles Craig
John Hennessey
Roger Yeaman
Kenneth Meyers
Nick Kaurich
James Kelly
Kenneth Glenn
Kenneth Ford

Appendix B

James Fargo
Larry Gardner
Tom Christine
James Brewster
Douglas Turchank
Joe Prince
Jack Mullroy
Doug Jedlinsky
Bob Elsworth

(e) Rescind any departures from terms and conditions of employment that existed immediately before the Respondent's transfer of work from Central Transport and D&S Leasing to Central Cartage, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from June 2, 1986, until it negotiates in good faith with the Union to agreement or to impasse; provided, however, that nothing in the order shall authorize or require the withdrawal or elimination of any wage increase unlawfully granted to employees without a request from the Union. The remission of wages and benefits shall be computed in the manner prescribed in Ogle Protection Service, 183 NLRB 682 (9170), enf.d 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in New Horizons for the Retarded.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

Appendix B

(g) Post at its Cleveland, Ohio facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 8,

---

[21]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Post by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith with Teamsters Local Union No. 964, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO by refusing to recognize and bargain with Teamsters Local 964 in the appropriate unit and by refusing to bargain with Teamsters Local 964 concerning our decision to cancel our contract with D&S Leasing, Inc. and concerning the effects of transfer of automotive consolidation work at our Cleveland, Ohio terminal from D&S Leasing, Inc. to Central Cartage Company.

WE WILL NOT alter the wages, hours, or other conditions of employment of employees in the appropriate bargaining unit, without bargaining with the above-mentioned union.

WE WILL NOT refuse to supply Teamsters Local 964 requested information, which is necessary for and relevant to its performance as the exclusive bargaining agent of the bargaining unit employees.

WE WILL NOT discourage membership in Teamsters Local 964 by laying off and refusing to recall employees pursuant to a plan to avoid the obligations of a subsisting collective-bargaining agreement.

WE WILL NOT coerce employees by informing them that were not hired because they held positions with Teamsters Local 964.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the above-named Union as the exclusive representative of our employees in the appropriate

unit described below and, if agreement is reached, embody it in a signed written agreement.

All dockmen and yardmen performing automotive consolidation work at 5400 West 137th Street, Cleveland, Ohio, excluding all clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL bargain, on request, with Teamsters Local 964 concerning our decision to cancel our contract with D&S Leasing, Inc. and concerning the effects of the transfer of automotive consolidation work at our Cleveland, Ohio terminal from D&S Leasing, Inc. to Central Cartage Company.

WE WILL furnish the Union with any and all information requested by it and reasonably related to its function as collective-bargaining representative.

WE WILL offer the employees named below, who were refused hire by Central Cartage Company as a result of our unlawful action, immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any employee hired to replace them, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest:

Donald Gruszezynski
Robert Murphy
Robert Jolluck
Greg Henry
Clark Kinney
Barry Peters
Archer Bailey III
Daniel Kenyon
Joseph Starlovic
Robert Poczontek
Ron Nougsel
Robert Grabinski
Ben Pepera
Richard Miller
Mick Ochal
Bob Banta
Charles Craig
John Hennessey
Roger Yeaman
Kenneth Meyers
Nick Kaurich
James Kelly
Kenneth Glenn
Kenneth Ford
James Fargo

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

James M. Stephens
Chairman

Mary Miller Cracraft
Member

Dennis M. Devaney
Member

Larry Gardner
Tom Christine
James Brewster
Douglas Turchank
Joe Prince
Jack Mullroy
Doug Jedlinsky
Bob Elsworth

WE WILL rescind any departures from terms and conditions of employment that existed immediately before our transfer of work from Central Transport and D&S Leasing to Central Cartage, and WE WILL retroactively restore preexisting terms and conditions of employment, including wages rates and benefit plans, and WE WILL make employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from June 2, 1986, until we negotiate in good faith with the Union to agreement or impasse; provided, however, that we will not withdraw or eliminate any wage increase unlawfully granted to employees, without a request from the Union.

CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND CENTRAL CARTAGE COMPANY, A SINGLE EMPLOYER ((Employer)

APPENDIX C

Opinion of the Court of Appeals, January 17, 1992

APPENDIX C

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-5236

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND CENTRAL CARTAGE COMPANY,
Respondents.

Argued: October 28, 1991 Decided: January 17, 1992

BEFORE RYAN and BOGGS, Circuit Judges, and GODBOLD, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Aileen A. Armstrong, Deputy Associate General Counsel, Frederick Havard, Argued & Briefed, Howard E. Perlstein, David A. Fleisher, Judith A. Dowd, Washington, D.C., Frederick Calatrello, Director, National Labor Relations Board, Cleveland, Ohio, for Petitioner; Robert L. Duty, Timothy K. Carroll, Argued & Briefed, Dykema & Gossett, Detroit, Michigan, for Respondents.

RYAN, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order issued against Centra, Inc. and its subsidiaries, Central Cartage Company (Cartage) and Central Transport, Inc. (Transport), for violations of sections 8(a)(1) and (3), and 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C.

§§ 158(a)(1), (3), (5).[1] The order is reported at 299 N.L.R.B. No. 97. Centra, Cartage, and Transport have agreed, for purposes of this proceeding, to be treated as a single employer.

For the reasons set forth below, the Board's application for enforcement is granted.

I.

In the middle of 1982, Central Transport successfully bid on a contract with General Motors to break down, consolidate, and deliver freight in the Cleveland area. Central Cartage regularly did consolidation work, but Centra decided to perform this contract work through Central Transport. Transport leased a Cartage terminal for the GM consolidation work and, rather than employing Cartage workers, contracted with D & S Leasing Company to supply labor for the operation. D & S had already supplied drivers to Transport in Cleveland. Cartage dock workers in Cleveland were represented by Teamsters Local 407. The D & S employees, however, both drivers and dockworkers, were represented by Teamsters Local 507.

The employees performing GM consolidation work for Transport were on the payroll of D & S. Transport reimbursed D & S or its expenditures plus a percentage, fluctuating with the size of the payroll. Charles Garavaglia, then vice president for labor relations at Transport and Cartage, attended the initial contract negotiations between D & S and Local 507 in 1982, in order to identify acceptable economic terms of the contract and to stress Transport's need for flexible working hours to accommodate GM's "just in time" delivery requirements. The 1982 negotiations

---

[1]Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [section 7]...." 29 U.S.C. § 158(a)(1). Section 7 protects the right of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Specific violations of section 8(a)(3) or 8(a)(5) may also state derivative violations of section 8(a)(1). *Cf. G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989). Thus, we address only the substantive elements of sections 8(a)(3) and 8(a)(5).

led to a so-called "white paper" agreement, different from the Teamsters National Master Freight Agreement (NMFA) with respect to the terms and conditions of employment. Later in 1982, Teamsters Local 964 replaced Local 507 as the bargaining representative of D & S employees.

In 1985, D & S and Local 964 negotiated a new agreement, effective June 1, 1985 through March 31, 1988. Attending the 1985 negotiations were George Rogers of D & S, Stephen Bridge of a multi-employer association representing D & S, and Andrew Suckart, a representative of the Ohio Conference of Teamsters. The 1985 negotiations and agreement, unlike 1982, involved D & S employees working in other jurisdictions, specifically Teamsters Locals 20, 118, and 449, as well as 964. In 1985, the union sought a work preservation clause that would allow D & S employees to "follow the work" should Central Transport cancel its contract for labor with D & S, but the proposal was rejected by D & S as unacceptable to its client, Central Transport.

In February or March 1986, Centra officials determined that the GM consolidation work could be done for less money if performed by "new hires" employed under the auspices of Central Cartage and subject to the NMFA. The NMFA would apply to Cartage employees represented by Teamsters Local 407 and allowed for "new hire" wages approximately $2 less per hour than those paid to Local 964 members. Moreover, "new hires" formerly employed by D & S would lose seniority and health and welfare benefits which had accrued under the "white paper" agreement between D & S and Local 964. Garavaglia, then vice president for labor relations, testified that economics alone motivated the changeover to Cartage.

In early May 1986, Joe Goryl, a Centra official, asked Bruce Morrison, Cartage's terminal manager at the Cleveland dock, to prepare a list of D & S employees that Morrison felt should be hired by Cartage when it took over the GM consolidation work. Morrison listed 17 employees. He denied that union activity or support played a role in the selection of the employees and

claimed to have picked only the "superstars" to continue on with Cartage. Jim Berquist, operations manager at the terminal, recommended five more D & S employees to be hired by Cartage, and Centra officials apparently chose four others. In all, 26 former D & S employees were ultimately hired by Cartage. Though the decision as to which D & S employees would be hired by Cartage was already made, short, perfunctory interviews were held with all employees.

On May 8, 1986, Goryl issued a memorandum to Cartage president Larry Thomas setting forth a four-week plan for the transition from D & S to Cartage. According to the memorandum, approximately 15 former D & S employees were to be employed at the new 45-man Cartage operation. Weeks one through three were to be used to conduct background checks on the 15 D & S candidates, hiring 5 dockmen per week. By week three, applicants for the other 30 positions were also to be hired "anonymously." To this end, an advertisement was published in the Cleveland *Plain Dealer* on May 15, 1986, seeking employees for Central Cartage's local operations.

Oswald Kelm, president of Teamsters Local 964 and bargaining representative of the D & S employees at the Cleveland dock, learned of the advertisement and telephoned Bruce Morrison to find out why Cartage was seeking dockmen. Morrison told Kelm that he knew nothing about the matter. Kelm sent a registered letter dated May 16, 1986 to Morrison, expressing the local's concerns about the advertisement and seeking clarification of its meaning to and effects on the members of Local 964.

Kelm's letter was never answered. Other testimony regarding the events of May 16, 1986 to June 2, 1986 is conflicting. Principally, the question before the Board was whether Local 964 was given notice of Centra's plan to terminate D & S and afforded an opportunity to bargain over that decision and the effects of the decision.

Appendix C

Kelm testified that neither Cartage's president, Larry Thomas, nor Richard Silverwood, who handled labor relations, responded to his phone calls. Kelm also testified that other discussions with terminal manager Bruce Morrison were uninformative, as Morrison continued to tell Kelm that he had no knowledge of the matter. According to Kelm, Silverwood returned his call only after the June 2 changeover to Cartage had already occurred. Silverwood had a different recollection of events. He testified to several telephone discussions with Kelm in May 1986, during which he informed the union president that Teamsters International officials had told the company to do away with personnel leasing companies, or "flesh peddlers," that Cartage would be taking over the Cleveland dock operations and already had a contract with Teamsters Local 407, and that while D & S employees would be permitted to apply for positions with Cartage, the company would hire its own personnel for the job.

Silverwood also testified to a conversation in the week prior to the transition to Cartage with "Mr. Compo," another official with Local 964, after he had received word that Kelm had been assuring D & S employees that Cartage would hire the workers in seniority order. According to Silverwood, Compo was informed that Kelm had never been told that personnel would be hired in seniority order. Silverwood placed another call that day to Local 964 and again spoke to Compo, though Silverwood believed that Kelm was present during the conversation and aware of the information provided by Silverwood.

Based on the conflicting evidence presented, the ALJ found that Local 964 lacked adequate notice of Cartage's plans not to hire all of the D & S employees until at least May 28, 1986, based upon Kelm's assertions to the D & S employees regarding seniority hiring on that date, a letter from another union official on that date stating that he understood that former employees of D & S would become employees of Central Cartage, and the timing of telephone calls between Silverwood and Kelm.

Appendix C

Centra also asserts that Local 964 received notice of the changeover earlier than May 28 through conversations Silverwood had with Andrew Suckart, the representative of the Ohio Conference of Teamsters who negotiated the 1985 "white paper" agreement between D & S and several Teamsters local unions, and Robert Cassidy, the head of the Ohio Conference of Teamsters, at a Teamsters convention in Las Vegas during the week of May 19, 1986. In these conversations, Silverwood claims to have sought and gained assurances from Suckart and Cassidy that Cartage was not obligated to hire all of the D & employees when it assumed control of the Cleveland dock operations. The ALJ and the Board determined that Local 964 was not placed on notice of Centra's plan by these conversations.

On May 31, 1986, the dockworkers were informed by Lawrence Koubeck, vice president of D & S, that they would have no job after that date unless Cartage called on them. One employee, Donald Gruszezynski, a former union steward, testified that Jim Bowen, a dock foreman, told him that Centra was trying to get rid of certain employees because of union activity. Another D & S employee, Kenneth Meyers, testified that dock foreman Wayne Gentry told him that he would not likely be called back because Bruce Morrison did not like union people. Meyers also stated that Joe Imondi, another dock foreman, told him that he and Archer Bailey III would not be back because they were with the union. Sherman Brown, a business agent for Teamsters joint Council 41 and the Ohio Conference of Teamsters, testified to a breakfast meeting with Silverwood in early June 1986 where Silverwood allegedly told him that Centra had not taken back D & S employees in seniority order because they wanted to get rid of four or five of them who had high seniority status. The dock foremen each denied making these statements, as did Silverwood. The ALJ credited the testimony of Gruszezynski and Brown on these matters. He also credit Meyers as to the occurrence and substance of conversations with Joe Imondi, but credited Wayne Gentry's denial of any conversations with Meyers.

Appendix C

On June 2, 1986, Cartage opened for business with 26 former D & S employees and 24 outside workers, all paid according to the terms for new hires under the NMFA. Thirty-three employees of D & S were not recalled by Cartage.

The Board, in its August 31, 1990 order, determined that Centra violated sections 8(a)(1) and (5) of the NLRA by failing to bargain with Teamsters Local 964 over its decision or the effects of its decision to terminate an employee-leasing contract, to provide adequate notice to the union of the decision, or to provide the union with relevant information requested by the local president. The Board found that by the time Local 964 gained knowledge of Centra's plans not to hire all the D & S employees represented by the union, it had been effectively presented with a *fait accompli*. The section 8(a)(1) and (3) violations were based on a finding of antiunion animus and on the conclusion that the dismissal of and refusal to rehire 33 employees upon termination of the employee-leasing contract, the deceptive implementation of these actions and the refusal to bargain, were acts "inherently destructive" to the employees' section 7 rights under the NLRA.

II.

Section 8(a)(5) of the NLRA makes it is [sic] an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). The duty to bargain collectively requires an employer and the union representing its employees to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...." 29 U.S.C. § 158(d). An employer's decision to contract work to employees outside the established bargaining unit is within the statutory scope of the "terms and conditions of employment" subject to mandatory collective bargaining. See *Fibreboard Corp. v. NLRB*, 397 U.S. 203, 210-13, 85 S.Ct. 398, 402-04, 13 L.Ed.2d 233 (1964). An employer violates section 8(a)(5) by unilaterally changing any term or condition of employment subject to

mandatory bargaining. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75, 101 S.Ct. 2573, 2578-79, 69 L.Ed.2d 218 (1981). A joint employer is subject to the statutory duty to bargain under section 8(a)(5). *G. Heileman Brewing Co., Inc. v. NLRB*, 879 F.2d 1526, 1530 (7th Cir. 1989).[2]

Centra offers two arguments in opposition to the Board's determination that the company violated its duty to bargain with Local 964 over the decision to terminate its contract with D & S. First, Centra argues that Local 964 is estopped from asserting a joint employer relationship. Thus, Centra cannot be found to have violated section 8(a)(5), as the company had no duty to bargain with Local 964. Second, Centra argues that Local 964 waived its right to bargain.

[1] In support of its estoppel claim, Centra relies on *Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069, 98 S.Ct. 1250, 55 L.Ed.2d 771 (1978), to argue that because the union waited until after the leasing agreement was terminated to claim joint employer status and an obligation to bargain, it should be foreclosed from asserting such a relationship. We have reviewed the case and find it inapposite. *Alaska Roughnecks* was based upon a purported joint employer's right of due process to participate and be heard in a representation hearing before being required to bargain. No such concerns are present in this case. Moreover, other critical facts are different. Most importantly, the record makes clear that Local 964 had no reason to assert a joint employer relationship or a duty to bargain until it discovered what Centra's plans were.

---

[2]Whether a joint employer relationship exists depends upon "such factors as the supervision of the employees' day to day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, in issuance of operating instructions." *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 247 (7th Cir. 1988). The Board's factual determination on this issue is entitled to summary affirmance as Centra has failed to challenge the Board's order on the merits. Such a failure constitutes abandonment of the issue. *NLRB v. Tennessee Packers, Inc.*, 344 F.2d 948, 949 (6th Cir. 1965). Moreover, we are satisfied on a review of the whole record that substantial evidence supported the finding that Centra acted as a joint employer with D & S.

This information was carefully concealed from Local 964 officials, however, until it was too late to bargain over Centra's decision to terminate the D & S contract or, more importantly, the effects of that decision on members of Local 964.

[2] With respect to waiver, a union may waive its statutory right to bargain, but such waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). The alleged waiver by Local 964 in this case is a factual issue. Thus, the findings of the Board must be upheld so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951). Having carefully reviewed the record as a whole, we find that ample evidence supports the Board's conclusion that Local 964 did not waive its right to bargain over unilateral changes in the terms and conditions of employment.

To begin, Centra claims that it was clear that Local 964 received notice of the company's plans not to hire all of the D & S employees prior to May 28, 1986, the date set forth by the Administrative Law Judge. The company relies primarily on Richard Silverwood's testimony to place the date earlier, although the ALJ specifically discredited that testimony. The ALJ's credibility determinations are entitled to great deference from this court. *NLRB v. Magnetics Int'l, Inc.*, 699 F.2d 806, 813 (6th Cir. 1983). Centra offers this court no compelling reason to reject the ALJ's credibility determination in this matter.

Next, the company faults the ALJ and the Board for failing to find that adequate notice was given to the union on the basis of Silverwood's discussions with Andrew Suckart and Robert Cassidy of the Ohio Conference of Teamsters in Las Vegas during the week of May 19, 1986. However, as the record clearly shows, neither man could speak for Local 964. Suckart and Cassidy were officers of the Ohio Conference of Teamsters, not of Teamsters Local 964. They had neither actual nor apparent authority to bargain for Local 964 as to Centra's decision to terminate the

D & S contract and to replace the union with Central Cartage employees under the jurisdiction of Teamsters Local 407. Obviously, they also therefore lacked the authority to waive Local 964's rights to bargain over the decision and its effects.

[3] Finally, Centra asserts that it was open to changes in negotiations at any time up until the changeover of June 2, 1986, and had Local 964 simply asked, the company would gladly have bargained over the decision. This assertion flatly conflicts with the findings that Centra had made its decision to terminate the D & S contract and to hire only certain D & S employees into its Cartage operations, implemented its plan secretly, and failed to consult Local 964 or to properly inform the union of its intention not to hire all of the D & S employees until it was too late to bargain. The Board's conclusion was well-founded on these facts. An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals. *Gulf States Mfg., Inc. v. NLRB*, F.2d 1390, 1397 (5th Cir.), *reh'g denied*, 715 F.2d 1020 (1983). If a policy is implemented too quickly after notice is given, or an employer has no intention of changing its mind, the notice constitutes nothing more than informing the union of a *fait accompli*. *Ciba-Geigy Pharmaceuticals Div.*, 264 N.L.R.B. 1013, 1017-18 (1982), *enforced*, 722 F.2d 1120, 1126 (3d Cir. 1983). "Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C.Cir. 1972).

On review of the record as a whole, we find substantial evidence to support the Board's findings. The determination that Centra violated sections 8(a)(1) and (5) is therefore upheld.

III.

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to discriminate against employees "in

regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..." 29 U.S.C. § 158(a)(3). A violation of section 8(a)(3) normally requires a finding of antiunion animus. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967). Some conduct, however, is considered so "inherently destructive" of employee interests that it will be deemed to violate section 8(a)(3) without necessity of proof that it was motivated by an antiunion purpose. *Id.* Inherently destructive conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 83 S.Ct. 1139, 1145, 10 L.Ed.2d 308 (1963). Therefore, such conduct bears "its own indicia of intent." *Id.* at 231, 83 S.Ct. at 1147.

In this case, the Board found that antiunion animus motivated Centra in its decisions as to whom to lay off and rehire upon the changeover from D & S to Cartage. Further, the Board determined that Centra's termination of the D & S contract, the transfer of consolidation work from Transport to Cartage in order to evade the terms of the 1985 "white paper" agreement between D & S and Local 964, and the company's covert acts taken to shirk its duty to bargain over the decision and its impact amounted to conduct inherently destructive of the section 7 rights of Local 964 members.

As to the inherently destructive finding, the Board concluded that Centra's conduct in terminating the contract with D & S without serving proper notice of its decision on Local 964 or allowing for meaningful negotiations about that decision and its effects, deceptively implementing a plan to continue operations at the Cleveland terminal under the auspices of Central Cartage, and treating former D & S employees as "new hires" under the NMFA violated section 8(a)(3). Those actions, the Board found, were "analogous to that of an employer that carries out a sham

closing of a facility in order to reopen under new terms and conditions of employment and therefore violated section 8(a)(3).

[4] While the Supreme Court has never precisely defined what constitutes "inherently destructive conduct," this concept relates to conduct exhibiting hostility to the process of collective bargaining itself, not to actions taken merely to further an employer's substantive bargaining position in a particular contract negotiation. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989). "Inherently destructive conduct is that conduct which has 'far reaching effects which would hinder future bargaining,' i.e., that conduct which 'creat[es] visible and continuing obstacles to the future exercise of employee rights.' *Id.* (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)). The two types of recognized inherently destructive conduct are actions distinguishing among workers based on participation (or lack of participation) in a protected activity, and those acts which do not divide the work force, but rather discourage collective bargaining by making it appear as a futile exercise in the eyes of employees. *Esmark*, 887 F.2d at 748-49.

In *Esmark*, the court found that the Board could permissibly find that a company's repudiation of a collective bargaining agreement and subsequent reopening under a new corporate name after a two-week hiatus in operations communicated to employees that collective bargaining was "a futile exercise." *Id.* at 749. "The NLRB could conclude that the calculated repudiation of the collective bargaining agreement and prompt institution of less favorable terms sends a signal to employees that despite their diligent efforts to organize and bargain collectively, their contract may be disregarded." *Id.* Similarly, in *NLRB v. Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir. 1981), *cert. denied*, 457 U.S. 1105, 102 S.Ct. 2903, 73 L.Ed.2d 1313 (1982), this court held that an employer's attempt to avoid paying union wages by laying off employees rather than transferring them to a newly created subsidiary was inherently destructive behavior.

[5] The Board found that Centra's actions were motivated by a desire to pay lower wages and to avoid its obligations under the "white paper" agreement between D & S and Local 964. Centra sought to evade its obligation as a joint employer to negotiate with the D & S employees over the decision to terminate the contract and the effects of that decision. Its actions in terminating its contract with D & S, withholding from the union relevant information, and seeking to avoid its obligations to bargain with Local 964 reasonably support the Board's findings that such behavior was inherently destructive to protected employee rights of collective bargaining. This case fits well within the extant case law construing the meaning of "inherently destructive" conduct under section 8(a)(3).

Centra does not contest the 8(a)(3) violation based on a review of this case law, but offers other arguments why the finding should not be enforced. First, it argues that the finding that its actions were inherently destructive to employee rights is illogical, as 26 persons hired by Cartage were also members of Local 964 prior to the transition. Therefore, employees were not rejected on the basis of their union activities and its actions cannot be said to patently discourage membership in Local 964. This argument, however, is misdirected as it focuses on the first prong of inherently destructive conduct, actions distinguished among workers based on participation (or lack of participation) in a protected activity, rather than the second prong, acts which do not divide the work force but discourage collective bargaining by making it appear as a futile exercise to employees. See *Esmark*, 887 F.2d at 748-49. For the reasons stated, we think the Board reasonably concluded that the [sic] Centra's actions made collective bargaining appear futile in the eyes of the members of Local 964, whose section 7 rights were ignored by the company.

The company's other argument is that there can be no section 8(a)(3) violation based on inherently destructive conduct without a concurrent violation of section 8(a)(5). See *Milwaukee Spring Div. of Illinois Coil Springs Co.*, 268 N.L.R.B. 601

(1984), *enforced*, 765 F.2d 175 (D.C.Cir. 1985). For the reasons stated, the finding that Centra violated section 8(a)(5) was supported by substantial evidence on the record as a whole. Thus, there is a concurrent section 8(a)(5) violation in this case, and Centra's latter argument must fail as well.

[6] With respect to the issue of antiunion animus, Centra contests the Board's determination that the company failed "to articulate a definite standard by which employees were evaluated" in the rehiring decision. Under the analysis set forth in *NLRB v. Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), once the general counsel has made a *prima facie* showing of antiunion animus, i.e., that union activity was a "but for" cause of the disputed action, the employer must demonstrate that its actions would have been taken even in the absence of the union activity. Centra argues that it simply identified the best performers on the dock and hired them for its operations and that no regard was given to an employee's union activities. The company also claims that the Board's finding of antiunion animus, based on statements allegedly made by Cartage personnel that some of the D & S employees would not be hired back because of their involvement with Local 964, is "ludicrous." To support this claim, Centra points out that two former union committeemen were hired by Cartage and that at least two employees who had never participated in Local 964 activities were not hired. Taken together, the company claims that these facts prove that the layoffs and rehirings were made on the basis of work performance, not union activity.

[7] We find substantial evidence to support the Board's determination that Centra failed to carry its burden under *Wright Line* of responding to the general counsel's *prima facie* showing of antiunion animus. First, Centra has not shown that it lacked an antiunion animus simply by citing the fact that some union adherents were rehired while some nonactivists were not. In *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964), the

court held that "a discriminating motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." Further, Centra offered no objective or definable criteria to support its decision as to rehirings. The purely subjective rationale offered by Centra permitted an inference of antiunion motivation. Finally, the Board relied on the statements attributed to various Centra personnel only as evidence relevant to the issue of the company's state of mind in rehiring certain former D & S employees and laying off others without any definable criteria. These statements were not considered dispositive by the Board but were used only as further proof of antiunion animus.

Substantial evidence on the record as a whole supports both the finding of antiunion animus and inherently destructive conduct by Centra. The determination that Centra violated sections 8(a)(1) and (3) is therefore upheld.

IV.

For all of the foregoing reasons, we grant the NLRB's application for enforcement.

APPENDIX D

Order of the Court of Appeals Denying Motion to Set Aside Settlement, to Set Aside Enforcement and to Grant Rehearing, February 18, 1994

APPENDIX D

Order

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

V. CASE NO. 91-5236

CENTRA, INC., CENTRAL TRANSPORT, INC., CENTRAL CARTAGE COMPANY,
Respondents.

BEFORE: RYAN and BOGGS, Circuit Judges; GODBOLD, Senior Circuit Judge.*

Upon consideration of the respondents' motion to set aside settlement, to set aside order of enforcement and to grant rehearing, and further considering the response of the petitioner,

It is ORDERED that all motions be and they hereby are DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

*The Honorable John C. Godbold, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

APPENDIX E

Order of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc, April 29, 1994

APPENDIX E

Order

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

V. NO. 91-5236

CENTRA, INC., ET AL., INC.,
Respondents.

BEFORE: RYAN and BOGGS, Circuit Judges; GODBOLD,* Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

*Hon. John C. Godbold, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation

APPENDIX F

Relevant Statutory Provision, 29 U.S.C. Section 160(e)

APPENDIX F

29 U.S.C. § 160 (e) — Petition to court for enforcement of order; proceedings, review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or where such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions

of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification in section 1254 of Title 28.

(2)

No. 94-179

FILED
OCT 7 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's motion to order the reopening of a National Labor Relations Board hearing two years after the conclusion of that hearing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

American Iron & Steel Inst. v. *EPA*, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978)	8
Brady v. *Maryland*, 373 U.S. 83 (1963)	11
Carrier Corp. v. *NLRB*, 768 F.2d 778 (6th Cir. 1985)	9
Centra, Inc., 314 N.L.R.B. No. 144 (Aug. 19, 1994)	7
Central States Southeast & Southwest Areas Pension Fund v. *Rogers*, No. 92-2435 (Dec. 16, 1993)	13
Demjanjuk v. *Petrovsky*, 10 F.3d 388 (6th Cir. 1993), cert. denied, No. 93-1875 (Oct. 3, 1994)	11
W.W. Grainger, Inc. v. *NLRB*, 860 F.2d 244 (7th Cir. 1988)	12
NLRB v. *Nueva Eng., Inc.*, 761 F.2d 961 (4th Cir. 1985)	11
Southern Maryland Hosp. Ctr., 288 N.L.R.B. 481 (1988).	11
Wisniewski v. *United States*, 353 U.S. 901 (1957)	11

Statutes and regulations:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:	
29 U.S.C. 1301(b)(1)	13
29 U.S.C. 1301(b)(2)	13
Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1381 *et seq.*	13

Statutes and regulations—Continued: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 4
§ 8(a)(3), 29 U.S.C. 158(a)(3) 3, 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 4
29 C.F.R.:
Section 102.118(b)(1) 10
Section 102.118(d) 10

Miscellaneous:

NLRB Casehandling Manual (Pt. 1) (June 1989) 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-179

CENTRA, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to set aside a previous settlement, to set aside enforcement of its previous order, and to grant rehearing (Pet. App. 83a) is not yet reported. The National Labor Relations Board's order denying petitioner's motion for a hearing de novo and to reopen the record (App., *infra*, 1a-5a) is not yet reported. The initial opinion of the court of appeals (Pet. App. 67a-81a) is reported at 954 F.2d 366. The decision and order of the National Labor Relations Board in the underlying unfair labor practice proceeding (Pet. App. 46a-65a), including the decision of

the administrative law judge (Pet. App. 2a-44a), is reported at 299 N.L.R.B. 658.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1992. The order of the court of appeals denying the motion to set aside the previous settlement, to set aside enforcement of its previous order, and to grant rehearing was entered on February 18, 1994. A petition for rehearing was denied on April 29, 1994. Pet. App. 85a. The petition for a writ of certiorari was filed on July 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In mid-1982, petitioners[1] received a contract from General Motors Corp. to consolidate freight at their trucking terminal in Cleveland, Ohio. Petitioners' dockworkers at that terminal were represented by Teamsters Local 407 and covered by the Teamsters National Master Freight Agreement (NMFA). To staff the General Motors job, petitioners hired dockworkers from D&S Leasing, Inc. (D&S), a personnel leasing company, whose dockworkers were represented by Teamsters Local 964 and covered by a "white paper" agreement which contained different contract terms from the NMFA. Pet. App. 5a, 48a & n.5.

---

[1] Petitioners Central Transport, Inc. and Central Cartage Co. are wholly owned subsidiaries of petitioner Centra, Inc. Collectively, petitioners constitute a single employer within the meaning of the National Labor Relations Act. Pet. App. 4a & n.3. Central Transport, an over-the-road freight hauler, delivers goods to the Cleveland terminal, where Central Cartage dockworkers break down the shipments and consolidate them for local delivery. *Id.* at 48a.

In early 1986, petitioners decided to end their relationship with D&S and to have their own employees perform the consolidation work. Petitioners terminated their contract with D&S on Friday, May 31, 1986. The following Monday, June 2, 1986, petitioners resumed handling the General Motors freight with a crew of 50 dockworkers comprised of 26 former D&S employees and 24 new hires. Pet. App. 49a n.6, 50a, 52a & n.11. Petitioners refused to hire 33 former D&S employees, and treated the 26 former D&S employees whom they retained as "new" employees under the NMFA. As a result, beginning June 2, the 26 employees were paid approximately $2 per hour less than they had been receiving under the "white paper" agreement; these employees also lost seniority and health and welfare benefits accrued under that agreement. *Id.* at 50a, 51a.

2. On August 29, 1986, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that petitioners and D&S, acting as joint employers of the employees represented by Local 964, had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), (3), and (5). Pet. App. 2a. A hearing was thereupon held before an administrative law judge (ALJ), who found, *inter alia*, that petitioners and D&S were joint employers, and that they had violated Section 8(a)(1), (3), and (5) of the Act as charged. Pet. App. 2a-44a. On August 31, 1990, the Board issued a decision finding, in agreement with the ALJ, that petitioners had terminated their contract with D&S and refused to hire the 33 former D&S employees "as part of a plan to escape from [their] obligations under the ["white paper"] agreement." *Id.* at 51a. The Board held that petitioners' conduct violated Section 8(a)(1) and (3), in that it was "inherently destructive of these employees' rights

guaranteed under Section 7," and was motivated by anti-union animus. Pet. App. 51a. In light of this animus, the Board also held that petitioners violated Section 8(a)(1) and (5) by failing to bargain with Local 964 over the decision to terminate the D&S contract and the effects of that decision. Pet. App. 51a. The Board issued an appropriate remedial order. *Id.* at 59a-65a.[2] No remedy was imposed upon D&S, the Board's general counsel having stated at the start of the hearing that the Board had decided not to seek such a remedy against D&S. *Id.* at 38a n.43.

Of particular pertinence here, the Board, in concluding that petitioners violated the Act, specifically found that petitioners and D&S were "the joint employers of the dockmen who performed consolidation work for [petitioners] at the Cleveland facility and who were represented by Local 964." Pet. App. 49a. The Board explained (*ibid.*):

> Although D&S supplied the personnel to work at the Transport dock, it is clear from the record that Cartage supervisors directed the D&S personnel in their day-to-day activities. Bruce Morrison, Cartage's terminal manager, Jim Berquist, Cartage's operations manager, and Cartage's dock foremen Wayne Gentry and John Smith gave D&S

---

[2] The order required petitioners, among other things, to reinstate and make whole the 33 former D&S employees who were refused employment, to restore retroactively the preexisting terms and conditions of employment that existed on May 31, 1986, and to remit all wages and benefits that would have been paid, absent petitioners' unilateral changes, from June 2, 1986 until petitioners negotiated in good faith or to impasse with Local 964 respecting the decision to terminate the D&S contract and the effects of that decision. Pet. App. 61a-62a.

> employees their work assignments, scheduled their working hours, approved requests for time off, and assigned men to train newly hired employees. In addition, Morrison testified that his approval was necessary before D&S could hire individuals to work at the dock and that he sometimes hired employees and placed them on the D&S payroll without consulting Rogers [president of D&S]. Morrison, Berquist, Gentry and Smith * * * also had the authority to discipline and terminate D&S personnel.

3. On January 17, 1992, the court of appeals issued a decision enforcing the Board's order. Pet. App. 67a-81a. The court found that the Board was entitled to summary affirmance of its factual determination that a joint employer relationship existed between petitioners and D&S because petitioners failed to challenge that finding on the merits. *Id.* at 74a n.2.[3] The court also found on the merits that substantial evidence supported the Board's joint employer finding. *Ibid.* Petitioners did not seek review of the court of appeals' decision in this Court.

4. On May 28, 1993, petitioners moved before the Board for either a hearing *de novo* or for reopening of the record. The basis for this motion, petitioners asserted, was that they had recently obtained information calling into question the credibility of Charles Garavaglia, a witness who had testified for the Board in the unfair labor practice proceeding. Petitioners asserted that they had learned that Garavaglia, who had

---

[3] In the court of appeals, petitioners did not challenge the finding of a joint employer relationship, but instead argued that Local 964 was estopped from asserting such a relationship, and that Local 964 had waived its right to bargain. The court rejected both contentions. Pet. App. 74a-76a.

been petitioners' vice president for labor relations, had in fact also been a labor consultant for D&S; petitioners claimed that had the ALJ known that Garavaglia was, in effect, an agent of D&S, he would have discounted Garavaglia's testimony and, in particular, would not have found that petitioners and D&S were joint employers. App., *infra*, 2a-3a.

On September 20, 1993, the Board denied the petition. App., *infra*, 1a-5a. The Board held first that it lacked juris-diction to modify an order that had been enforced by a court of appeals. *Id.* at 3a-4a. The Board also rejected peti-tioners' argument on the merits. It explained:

> In essence, [petitioners] contend[] that Garavaglia was biased in favor of D & S because he was an agent of D & S and not of [petitioners]. However, [petitioners] ha[ve] shown, at most, that Garavaglia was an agent of D&S. [Petitioners] ha[ve] not contradicted the Board's finding that Garavaglia was also an agent of [petitioners]. Since Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument.

Id. at 4a.[4]

5. On January 5, 1994, petitioners filed a motion in the court of appeals seeking, among other things, a "remand" of the unfair labor practice proceeding to the Board on the joint employer issue. In that motion, petitioners again attacked Garavaglia's credibility on the basis of his business relationship with D&S. Petitioners also alleged that the Board's counsel at the hearing, Paul Lund, had relinquished its claim for money damages

[4] In view of the dual bases for the Board's action, petitioners mischaracterize the record in asserting (Pet. 5) that the Board declined to consider their motion on the merits.

against D&S in exchange for obtaining Garavaglia's testimony, and that the same counsel had subpoenaed Garavaglia to testify "at Garavaglia's own request to conceal from [petitioners] and its counsel that Garavaglia was clandestinely helping [counsel for the General Counsel] against [petitioners]."

On February 18, 1994, the court of appeals denied petitioners' motion in a summary order. Pet. App. 83a. On April 29, 1994, the court of appeals denied petitioners' petition for rehearing, again in a summary order. *Id.* at 85a.[5]

ARGUMENT

Petitioners claim (Pet. 6-24) that counsel for the Board acted improperly in not disclosing Garavaglia's relationship with D&S prior to the unfair labor practice hearing, and that the court of appeals erred in not ordering reopening of the hearing to allow the Board to reexamine its "joint employer" finding in light of the disclosure of that relationship. Petitioners' claim is without merit, and the order of the court of appeals

[5] To date, petitioners have not complied with any portion of the Board's order requiring the payment of money. On May 6, 1993, the Board's general counsel issued a compliance specification against petitioners, seeking backpay and contributions to the union's trust funds, as required by the Board's enforced order. At the opening of the compliance hearing, petitioners agreed to pay $5.53 million in backpay on or before December 31, 1993, thus leaving as the only issue for resolution the amount petitioners owed the union's trust funds. On December 20, 1993, the ALJ ordered petitioners to pay the trust funds approximately $1.3 million, and the Board adopted the ALJ's order. *Centra, Inc.*, 314 N.L.R.B. No. 144 (Aug. 19, 1994), slip op. 1, 2, 7. Petitioners subsequently reneged on their agreement to pay $5.53 million in backpay. On September 7, 1994, the Board authorized the General Counsel to initiate a civil contempt proceeding for recovery of that amount.

conflicts with the decisions of no other court of appeals. Review is thus not warranted.

1. The court of appeals' judgment enforcing the Board's order against petitioners became final approximately two years before petitioners' motion. Accordingly, petitioners' motion to the court of appeals was in effect a motion to recall the mandate which had issued in the enforcement proceeding before the court of appeals. Such a remedy is rarely granted, reflecting "the salutary principle that there should be an end to a controversy in litigation." *American Iron & Steel Inst.* v. *EPA*, 560 F.2d 589, 592 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (summarizing authority regarding motions to recall mandate). "All of the courts of appeals have emphasized that recall of a mandate is an extraordinary remedy, one to be used sparingly. * * * [E]xercise of the authority to alter a judgment falls within the *discretion* of the court, but * * * such discretion should be employed * * * only in unusual circumstances." 560 F.2d at 594.

2. As the denial of petitioners' motion by the court of appeals reflects, this case involves no such unusual circumstances. Petitioners contend (Pet. i, 22) that the hearing should have been reopened on the joint employer issue because petitioners were unable, due to several acts of alleged misconduct on the part of counsel for the Board, effectively to challenge Garavaglia's credibility through cross-examination in the unfair labor practice proceeding. Specifically, petitioners allege (Pet. 5) that "Garavaglia had met with the Board's counsel and had agreed to aid their [*sic*] case in return for the release of liability of D&S Leasing and had received a subpoena prior to the ALJ hearing to hide his complicity and further catch [petitioners] by surprise."

Petitioners' allegations of misconduct are groundless. To begin with, the Board's decision not to seek monetary liability against D&S, as Board counsel Lund explained to the ALJ at the start of the hearing, was a result of "the factual situation involved here." Tr. 7; Pet. App. 38a n.43. The record discloses two legitimate reasons for this decision. First, despite D&S's joint employer status with petitioners, the evidence did not establish that D&S participated in or instigated petitioners' scheme to evade their obligations to the employees represented by Local 964. Instead, as the Board found, it was petitioners who, motivated by antiunion animus, unlawfully terminated the personnel leasing contract with D&S, caused D&S to lay off the employees, and then refused to hire them, all as part of a wholesale scheme to evade the terms of the "white paper" agreement. Pet. App. 37a, 51a. Under these circumstances, it was proper for the Board's counsel to avoid holding D&S, an essentially innocent party, financially liable for violations committed by petitioners. See *Carrier Corp.* v. *NLRB*, 768 F.2d 778, 783 (6th Cir. 1985). Second, it would have served no useful purpose for the Board to have obtained a monetary judgment against D&S, as D&S had become defunct by the time of the hearing. Pet. App. 38a n.43. Petitioners' claim that monetary claims against D&S were dismissed by the Board in return for the Board's receiving favorable testimony from Garavaglia is without any foundation.[6]

---

[6] Petitioners' assertion that their counsel at the hearing was "ambushed" by the announcement of the Board's decision not to seek damages from D&S (Pet. 15) is belied by the fact that petitioners' counsel at no point objected to this decision or sought an adjournment of the proceeding.

Also unavailing is petitioners' allegation (Pet. 5) that Garavaglia sought to be subpoenaed by the Board so as to create a misleading impression that he was testifying only because compelled to do so. The Board's established practice is to reimburse witnesses for travel, lodging, and meal expenses if they are subpoenaed by the General Counsel. NLRB Casehandling Manual (Pt. 1) Sec. 11780 (June 1989). In this case, Garavaglia resided near Detroit and the hearing was held in Cleveland. Hence, Garavaglia's request that he be subpoenaed ensured that he would be reimbursed for his travel and related expenses.

Finally, petitioners' contention that Board counsel Lund did not correct testimony of Garavaglia that he knew or should have known was false, and thereby perpetrated a "fraud" (Pet. 15-16), is likewise without merit. On cross-examination, Garavaglia was asked whether he had given an affidavit, statement, "or [any]thing of that sort" to the Board. Pet. 15. Such an affidavit or written statement would have been subject to disclosure to petitioners' counsel, see 29 C.F.R. 102.118(b)(1) and (d), whereas the substance of a conversation that is not memorialized would not. Garavaglia responded that he had given Lund no such statement. Pet. 15. Petitioners now assert (Pet. 16) that this answer was "a lie," and that Lund knew it to be such, for "Lund had indeed met with Garavaglia prior to the hearing in preparation of his case and in preparation of Garavaglia's testimony." Garavaglia's having met with Lund prior to his testimony, however, in no way establishes that Garavaglia had supplied the Board with either an affidavit or a written statement or that the Board was remiss in its disclosure obligations. Moreover, petitioners' counsel was hardly unaware that Lund had met with Garavaglia prior to the hearing: Garavaglia

was called as a witness by the Board, and it is common practice for lawyers to interview potential witnesses before deciding whether to call them to testify. See NLRB Casehandling Manual (Pt. 1) Sec. 10056.6 (June 1989) (providing that "[e]very attempt should be made to interview main representatives * * * of the charged party").[7]

Petitioners' claim that the Board's counsel committed misconduct is thus without foundation. Petitioners' related claim that the Board was obliged under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose Garavaglia's relationship with D&S (Pet. 6) is also baseless, for two reasons. First, the courts have uniformly held that *Brady* does not apply to Board proceedings which are civil in nature. *NLRB* v. *Nueva Eng., Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) (collecting cases).[8] Second, Gara-

[7] In fact, Lund had two brief telephone conversations with Garavaglia shortly before the hearing commenced before the ALJ on March 23, 1987. These conversations came after Garavaglia left petitioners' employ on April 8, 1986, approximately two months before the unfair labor practice charges in this case were filed. Tr. 25; Pet. App. 2a; Pet. 15. As a result, Lund was not required to give counsel for petitioners advance notice of these brief contacts. See *Southern Maryland Hosp. Ctr.*, 288 N.L.R.B. 481, 481 n.1 (1988).

[8] *Demjanjuk* v. *Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, No. 93-1875 (Oct. 3, 1994), on which petitioners rely for the contrary proposition (Pet. 6-7, 8, 13), is inapposite. *Demjanjuk* did not find the *Brady* rule applicable to Board proceedings, but only to "denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." 10 F.3d at 353. In any event, any conflict between the decision in this case and other decisions of the Sixth Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

vaglia's relationship with D&S was simply not exculpatory evidence, as is required for a *Brady* obligation to be triggered. The Board charged D&S along with petitioners; any testimony rendered by Garavaglia to the effect that a joint employer relationship existed between petitioners and D&S tended if anything to implicate D&S in petitioners' unfair labor practices. Furthermore, as the Board noted in denying petitioners' motion, petitioners did not dispute that Garavaglia had served as their agent too, and "[s]ince Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument." App., *infra*, 4a.

3. In any event, the assembled record supplies no reason to believe that the joint employer issue would have been resolved differently had petitioners been aware of Garavaglia's relationship with D&S. As the Board noted in denying the motion to reopen the hearing, in the hearing itself petitioners adduced no evidence contradicting Garavaglia's testimony to the effect that a joint employer relationship existed. App., *infra*, 4a n.8. Indeed, as is reflected in the portion of the Board's decision finding that a joint employer relationship existed, Garavaglia's testimony was fully corroborated by the testimony of other witnesses whose credibility petitioners do not question. See Pet. App. 49a. Whether a joint employer relationship exists depends upon "such factors as the supervision of the employees' day to day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, in issuance of operating instructions." Pet. App. 74a n.2 (quoting *W.W. Grainger, Inc* v. *NLRB*, 860 F.2d 244, 247 (7th Cir. 1988)). Here, Garavaglia testified (Pet. 3-4) that petitioners controlled the work assignments of D&S employees, approved and disapproved vacation requests, documented their work

performance and rules violations, and disciplined them without consulting with D&S. Other witnesses substantiated that testimony. Bruce Morrison, petitioners' own terminal manager, testified that his approval was necessary before D&S could hire individuals to work at petitioners' dock and that he sometimes hired employees and placed them on the D&S payroll without consulting George Rogers, D&S's president. Pet. App. 49a. Witnesses other than Garavaglia testified that petitioners assigned D&S employees work, scheduled their working hours, meted out discipline, approved and disapproved leave requests, and determined whether probationary employees would be hired on a permanent basis. Gov't C.A. Br. 6. Viewing the record as a whole, there was ample evidence to establish that petitioners and D&S were joint employers, wholly without regard to Garavaglia's testimony on the subject.[9]

---

[9] Petitioners err in suggesting (Pet. 22 n.13) that the "unreliability" of Garavaglia's testimony is evidenced by an alleged inconsistency between the court of appeals' decision in this case and the same court's decision in *Central States Southeast & Southwest Areas Pension Fund* v. *Rogers*, No. 92-2435 (Dec. 16, 1993) (unpublished opinion). The court of appeals' decisions are not inconsistent. In *Rogers*, the court affirmed district court findings (1) that D&S and other entities constituted a "common control group," and, as such, were a "single employer" under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301(b)(1), and (2) that George Rogers, the sole shareholder of D&S, was personally liable for the common control group's withdrawal from the union's funds under ERISA and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. 1381 *et seq.* Petitioners' duty under the order in this case to make the victims of its unfair labor practices whole by, among other things, remitting unlawfully withheld contributions to the union's benefit funds (Pet. App. 62a) is an entirely separate

In sum, the court of appeals' decision not to grant the extraordinary remedy of ordering reopening of the unfair labor practices proceeding was amply justified. That decision conflicts with no other authority of which we are aware. There is thus no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

OCTOBER 1994

---

matter from D&S's liability to those funds under ERISA and MPPAA.

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

D & S LEASING, INC; CENTRAL
TRANSPORT, INC., AND CENTRAL
CARTAGE COMPANY

Case 8-CA-19212

and

ARCHER BAILEY III, AN INDIVIDUAL

D & S LEASING, INC., CENTRAL
TRANSPORT, INC., AND CENTRAL
CARTAGE COMPANY

Case 8-CA-19282

and

TEAMSTERS LOCAL UNION NO. 964,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO

and

TRUCK DRIVERS UNION LOCAL 407,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO
PARTY OF INTEREST

ORDER DENYING MOTION

On August 31, 1990, a three-member panel of the National Labor Relations Board issued its Decision and Order[1] in which it found, inter alia, that the Respondent[2] and D & S, a personnel leasing firm, were joint employers and that the Respondent violated Section 8(a)(3) by causing the layoff of and refusing to recall employees jointly employed by the Respondent and D & S at the Respondent's Cleveland terminal. In finding the violation, the Board agreed with the judge's conclusion that the Respondent's termination of the employees and its refusal to rehire some of them were actions "inherently destructive" of the employees' Section 7 rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967). As part of the remedy for the unfair labor practices found, the Board ordered the Respondent to offer 33 named employees immediate and full reinstatement and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's discrimination against them. On January 17, 1992, the United States Court of Appeals for the Sixth Circuit enforced the Board's Order.[3]

On May 6, 1993, Region 8, on behalf of the General Counsel, issued a Compliance Specification and Notice of Hearing. On May 28, 1993, the Respondent filed a petition for a hearing de novo, or, in the

---

[1] 299 NLRB 658 (1990).

[2] The "Respondent" denotes collectively Central Transport, Central Cartage, and Centra, Inc., which the Board found to be a single employer.

[3] 954 F.2d 366.

alternative, a motion to reopen the record. The General Counsel filed a brief in opposition and a brief in response and the Respondent filed a reply brief. Thereafter, the Respondent filed a "supplemental exhibit" to its petition. The General Counsel filed a brief in response and the Respondent filed a reply brief.

In its petition, the Respondent contends that Charles Garavaglia, the Respondent's vice president for labor relations at all times relevant, was in fact "the Labor Consultant for D & S Leasing at all times pertinent hereto."[4] The Respondent asserts that Garavaglia was an agent of D & S at the time of the unfair labor practices.[5] Additionally, the Respondent contends that if the judge had known that Garavaglia was, in effect, an agent of D & S at all times relevant, he would not have relied on Garavaglia's testimony and therefore would not have found that the Respondent and D & S were joint employers or that the Respondent engaged in inherently destructive conduct in terminating and refusing to rehire the employees at issue.

As an initial matter, we find that it would be inappropriate for the Board to reconsider these

---

[4] In support of its contention, the Respondent relies on an August 17, 1986 letter signed by D & S president George Rogers which states, inter alia, that Charles Garavaglia of C & G Consultants was Rogers' "representative" at the time.

[5] D & S and Local 507 (replaced by Local 964 in late 1982) entered into a collective-bargaining agreement in mid-1982. The parties renewed the contract in 1985. In May 1986, the Respondent caused D & S to layoff the empoyees at issue and refused to rehire them, conduct which, as noted above, the Board found to be inherently destructive of the employees' Section 7 rights. The Respondent dismissed Garavaglia in April 1986.

issues because the Board no longer possesses jurisdiction to modify the Order in this case. In this regard, we observe that the Board has stated that it lacks jurisdiction to modify an order once it has been enforced, as here, by a United States circuit court of appeals.[6] Further, even assuming that we possess jurisdiction, we would find the Respondent's petition lacking in merit. In essence, the Respondent contends that Garavaglia was biased in favor of D & S because he was an agent of D & S and not of the Respondent. However, the Respondent has shown, at most, that Garavaglia was an agent of D & S. The Respondent has not contradicted the Board's finding that Garavaglia was also an agent of the Respondent.[7] Since Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument.[8]

IT IS HEREBY ORDERED that the Respondent's petition for hearing de novo, or, in the alternative, motion to reopen the record, is denied.

---

[6] See *Royal Typewriter Co.*, 239 NLRB 1, 2 (1978), and *Dependable Tile Co.*, 229 NLRB 1034 (1989). See also *NLRB v. Mastro Plastic Corp.*, 261 F.2d 147, 148 (2d Cir. 1958).

[7] 299 NLRB 658.

[8] We note that in the underlying proceeding the Respondent failed to present evidence contradicting Garavaglia's testimony or to assert that Garavaglia was acting outside the scope of his authority.

Dated, Washington, D.C., September 20, 1993.

/s/ JAMES M. STEPHENS
James M. Stephens, Chairman

/s/ Dennis M. Devaney
Dennis M. Devaney, Member

/s/ John Neil Raudabaugh
John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Supreme Court, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

(3)

No. 94-179

In The Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC.,
CENTRAL TRANSPORT, INC.,
AND
CENTRAL CARTAGE COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK A. MORAN*
ERIC A. PARZIANELLO
SCOTT T. STIRLING
EVANS & LUPTAK, P.L.C.
2500 Buhl Building
535 Griswold Street
Detroit, Michigan 48226
Telephone (313) 963-9625
ATTORNEYS FOR PETITIONERS
**Counsel of Record*

BEST AVAILABLE COPY

12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RESPONDENT ADMITTED ITS IMPROPER CONDUCT BUT DENIED ITS OBLIGATION TO ACT WITHIN THE APPLICABLE CANONS OF ETHICS	2
A. The Board Admitted That It Discussed The Case With Garavaglia In Preparation Of The Case	2
B. Government Attorney Lund Compounded His Improper Actions By Allowing Garavaglia To Mislead The ALJ	2
C. Government Attorney Lund Was Subject To The Professional Canons Of Ethics Of The State Of Ohio	4
II. A WRIT OF CERTIORARI SHOULD BE GRANTED FOR THE REASON THAT ACCEPTANCE OF RESPONDENT'S INTERPRETATION OF *DEMJANJUK* WOULD RESULT IN A CONFLICT BETWEEN THE CIRCUITS	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Coleman v. American Red Cross, 23 F.3d 1091 (6th Cir. 1994)	7
Cuyahoga County Bar Ass'n v. Gerstenslager, 45 Ohio St. 3d 88, 543 N.E.2d 491 (1989)	5
D&S Leasing, Inc. v. Bobier, Case No. 92 CV 0209 (U.S.D.C. N.D. Ohio, filed January 29, 1992)	3
Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), *cert. denied,* No. 93-1875 (October 3, 1994)	6, 7
In re FMC Corp., 430 F. Supp. 1108 (S.D.W.Va. 1977)	5
Meat Price Investigator's Ass'n v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978)	5
Office of Disciplinary Counsel v. Gorman, 43 Ohio St. 3d 166, 539 N.E.2d 1120 (1989)	5
Office of Disciplinary Counsel v. Smakula, 39 Ohio St. 3d 143, 529 N.E.2d 1376 (1988)	5
Office of Disciplinary Counsel v. Head, 20 Ohio St. 3d 16, 489 N.E.2d 702 (1985)	5
United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993)	7
Miscellaneous:	
R. Keeton, *Trial Tactics and Methods* (2d ed. 1973)	3, 4
Model Rules of Professional Conduct Rule 5.1 (1983)	6
NLRB Casehandling Manual (Pt. 1) (June 1989)	4
NLRB General Counsel Rule 10352.1	8
Ohio Code of Professional Responsibility DR 1-103 (1987)	6
Ohio Code of Professional Responsibility DR 7-104 (1974)	5
Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 01 (1990)	6
Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 20 (1990)	5
Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Informal Op. 1377 (1977)	5

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent's October 7, 1994 Brief in Opposition to the Petition for a Writ of Certiorari ("Brief in Opposition") contains material admissions which were never before made by the National Labor Relations Board ("Board") in any court or proceeding below. In its response to the request of Petitioners CenTra, Inc., Central Transport, Inc. and Central Cartage Company (collectively "CenTra") before the Court of Appeals for the Sixth Circuit, the Board asserted a general denial of any wrongdoing but failed to admit the occurrence of clandestine prehearing contacts between CenTra's former Vice President Labor Relations and current labor consultant, Charles Garavaglia ("Garavaglia") and the Board attorney Paul Lund ("Government Attorney Lund").

In its Brief in Opposition, the Solicitor General for the first time admits to the clandestine complicity of the Board with Garavaglia and the concealment of that relationship from CenTra. This admission comes after seven years of unjustified silence, concealment and avoidance by the Board. The Board's admission of its improper contacts was calculated to occur only *after* the record below had been closed.

Unless CenTra is granted the opportunity to have the proceedings reopened, the Board will have profited by its improper acts, scheme of deception and sharp practice of its counsel.

I.

RESPONDENT ADMITTED ITS IMPROPER CONDUCT BUT DENIED ITS OBLIGATION TO ACT WITHIN THE APPLICABLE CANONS OF ETHICS

The Board admitted its contacts with Garavaglia in preparation of the Board's case, thereby also acknowledging a misleading or perjurious response of Garavaglia during cross-examination. However, the Board attempted to falsely justify certain of the admissions and to trivialize those admissions.

A. The Board Admitted That It Discussed The Case With Garavaglia In Preparation Of The Case.

> "In fact, Lund had two brief telephone conversations with Garavaglia shortly before the hearing commenced before the ALJ on March 23, 1987." Brief in Opposition, p. 11, n.7.

That was the first time that the government admitted the Board's complicity with Garavaglia. The Solicitor General does not give exact dates for the times that Government Attorney Lund spoke with Garavaglia but suggests that it was "shortly before the hearing commenced before the ALJ on March 23, 1987." Brief in Opposition, p. 11, n.7.

The dates of contact and the discussions that ensued are critical to a defense of the charges against CenTra. At all times relevant to the Board charges, Garavaglia was either CenTra's Vice President Labor Relations or their labor consultant under written contract. That is true through the time of the proceedings before the Administrative Law Judge ("ALJ"), the affirmance by the Board and the initial appeal to the Court of Appeals for the Sixth Circuit.

B. Government Attorney Lund Compounded His Improper Actions By Allowing Garavaglia To Mislead The ALJ.

Government Attorney Lund was aware that Garavaglia was intentionally misleading the ALJ concerning his cooperation with the Board when Garavaglia denied making any statements of any sort to a representative of the Board. *See* Petition for Writ, p. 15.

Yet Government Attorney Lund sat silently as Garavaglia denied contact with the Board. Government Attorney Lund knew that Garavaglia's testimony was either perjurious or misleading and that CenTra's counsel was completely unaware of his prehearing contacts with Garavaglia.

The Board now attempts to minimize the impact of those improper contacts, misleading testimony and complicity in the testimony by the Board by claiming that Garavaglia was only denying that he had given written statements to the Board — that the definition of "statement or [any]thing of that sort" ruled out verbal statements and clandestine meetings. Brief in Opposition, p. 10; *See* Petition for Writ, p. 15. Even a cursory reading of the questions and answers demonstrates the falsity of that position.[1]

The following conclusions are inescapable:

(1) Garavaglia either lied to or misled the ALJ, CenTra and CenTra's counsel;

(2) Garavaglia's false testimony was condoned by the silent acquiescence of Government Attorney Lund;

(3) Government Attorney Lund was an officer of the Court and a member of the Ohio bar;

(4) Garavaglia's testimony was damaging;

(5) Garavaglia's testimony was given substantial weight because of his position with CenTra, because he was the government's witness although formerly employed by CenTra and presently working as CenTra's labor consultant, and because he was the first witness called during the proceedings;[2]

---

[1]The Board also attempted to trivialize its hidden agenda by claiming that "it would have served no useful purpose for the Board to have obtained a monetary judgment against D&S, as D&S had become defunct by the time of the time of the hearing." Brief in Opposition, p. 9. That is simply not true. D&S remained in business for years after the ALJ proceedings and itself commenced a lawsuit in federal district court in 1992. *See D&S Leasing, Inc. v. Bobier*, Case No. 92 CV 0209 (U.S.D.C. N.D. Ohio, filed January 29, 1992).

[2]It is a common trial practice to call as one's first witness a strong spokesperson for counsel's position to influence the trier of fact and to place the opponent on the defensive.

(6) Had the ALJ been informed that Garavaglia was the labor representative of D&S, Garavaglia's testimony might have been considered the testimony of an interested D&S representative rather than the admissions of CenTra;

(7) Garavaglia was the craftsman of the relationship between D&S Leasing, Inc. ("D&S") and CenTra. Garavaglia structured the relationship to saddle CenTra with the liabilities of D&S. This occurred during a time that Garavaglia was working on behalf of D&S without CenTra's knowledge. Garavaglia owed CenTra a fiduciary obligation as either an employee or a consultant; and

(8) Government Attorney Lund was aware of Garavaglia's personal interest in having D&S released from liability. That release occurred without prior notice to CenTra at the commencement of the proceedings before the ALJ and immediately before Garavaglia was called by Government Attorney Lund as the Board's first witness. CenTra only found this information after the record was closed. It was hidden from CenTra by the false testimony of Garavaglia in denying contacts with the Board.

C. Government Attorney Lund Was Subject To The Professional Canons Of Ethics Of The State Of Ohio.

The Board attempts to justify its contacts with Garavaglia as being good governmental lawyering authorized by the NLRB Casehandling Manual.[3] Brief in Opposition, p. 10-11. That is nonsense.

Government Attorney Lund was practicing law in the state of Ohio. Attorneys registered in Ohio who work for the federal or

---

All of that was accomplished with Garavaglia's pre-planned testimony. *See* R. Keeton, *Trial Tactics and Methods* 23 (2d ed. 1973).

[3]Contrary to the Respondent's assertions, the Casehandling Manual is intended only to provide guidance for the Board's staff and has no substantive or procedural effect. The manual does not exempt Board attorneys from the ethical obligations imposed on all attorneys, rather the Board's staff members are expected to exercise "professional judgment". Introduction and Statement of Purpose, NLRB Casehandling Manual (Pt. 1) (June 1989).

state government are subject to the Ohio Code of Professional Responsibility while employed by the government. *See, e.g. Cuyahoga County Bar Ass'n v. Gerstenslager*, 45 Ohio St. 3d 88, 543 N.E.2d 491 (1989); *Office of Disciplinary Counsel v. Gorman*, 43 Ohio St. 3d 166, 539 N.E.2d 1120 (1989) (Assistant United States Attorney permanently disbarred in Ohio for violating Ohio Code of Professional Responsibility); *Office of Disciplinary Counsel v. Smakula*, 39 Ohio St. 3d 143, 529 N.E.2d 1376 (1988); *Office of Disciplinary Counsel v. Head*, 20 Ohio St. 3d 16, 489 N.E.2d 702 (1985).[4]

The Ohio Disciplinary Rules prohibit a lawyer from communicating with a party represented by counsel unless such counsel consents to the communication or the communication is authorized by law. Ohio Code of Professional Responsibility DR 7-104 (1974). When the party is a corporation, the prohibited class includes officers or employees who could commit the corporation to a position.[5] Government Attorney Lund was prohibited from communicating with Garavaglia who, as CenTra's labor representative, clearly had the authority to commit CenTra. CenTra's counsel's consent was never sought. *See Meat Price Investigator's Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978); *In re FMC Corp.*, 430 F. Supp. 1108, 1110-11 (S.D.W.Va. 1977).

If that were not clear enough, the Ohio Code Disciplinary Rules prohibit *ex parte* contact with former employees if the employees' conduct gave rise to the dispute. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 20 (1990). It is undisputed that Garavaglia negotiated CenTra's leasing contracts and handled its labor relations with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Union"),

---

[4]Other courts have found that the Canons of Professional Conduct are applicable to attorneys for the United States. *See In re FMC Corp.*, 430 F. Supp. 1108, 1110 (S.D.W.Va. 1977) (government concedes that the canons are binding upon United States Attorneys and attorneys of the Environmental Protection Agency).

[5]"Where an officer or employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of a party for the purposes of the Code." Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Informal Op. 1377 (1977).

which represented the complaining employees who were involved in the proceeding before the ALJ. During all times relevant to the facts of this case, Garavaglia was CenTra's spokesman to the Teamsters Union, the workers and all leasing companies with which CenTra dealt.

Clearly, then, Government Attorney Lund was compelled by the Ohio Code of Professional Responsibility to forgo contact with Garavaglia in the absence of consent by CenTra's counsel. The supervising attorneys of Government Attorney Lund are also responsible for failing to disclose his inappropriate actions.[6] That supervisory control liability continues up the chain of supervision at the Board to all attorneys who knew of the ethical breach.[7]

The lack of statutorily guaranteed discovery rights in Board proceedings means that an unethical Board attorney and his supervisory attorneys could act improperly and prevail before the Board, conceal their misconduct while the record is still open and then disclose their misconduct with impunity before this Court after the record has closed. The result is that CenTra is left without remedy and without ever receiving due process of law.

II.

A WRIT OF CERTIORARI SHOULD BE GRANTED FOR THE REASON THAT ACCEPTANCE OF RESPONDENT'S INTERPRETATION OF *DEMJANJUK* WOULD RESULT IN A CONFLICT BETWEEN THE CIRCUITS

The Solicitor General argues that the decision of the Court of Appeals for the Sixth Circuit in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, No. 93-1875 (October 3, 1994) is not applicable to Board proceedings, but only to "denaturalization and extradition cases". Brief in Opposition p. 11 n.8. If so, the Court must then reconcile the *Demjanjuk* holding

---

[6]Ohio Code of Professional Responsibility DR 1-103 (1987); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 01 (1990).

[7]Model Rules of Professional Conduct Rule 5.1 (1983).

regarding the candor required of government attorneys with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), where the court held that a government attorney has a duty of candor in civil cases.

In *Shaffer*, attorneys for the Environmental Protection Agency ("EPA") learned in the course of administrative proceedings that the EPA On-Site Coordinator had misrepresented his academic credentials and qualifications. Despite their knowledge of this conduct, the EPA attorneys did not disclose the information and were found to have breached their duty of candor to the court in the subsequent Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") collection action. The district court imposed the sanction of dismissal of the case and the government appealed.

The Fourth Circuit held that dismissal of the government's action was too severe a remedy, and remanded for determination of an appropriate remedy based upon certain enumerated factors. *Shaffer*, 11 F.3d at 462. *See also Coleman v. American Red Cross*, 23 F.3d 1091 (6th Cir. 1994). The court reasoned that the evidence of bad faith demonstrated by an administrative agency official in compiling the administrative record justified further inquiry outside the record. Moreover, the court held that this relief was required on remand because of the inherent difficulty in isolating the impact of the fraudulent misconduct on the proceedings, due to the EPA attorneys' failure to disclose evidence of the On-Site Coordinator's misrepresentations.[8]

The import of *Shaffer* and *Demjanjuk* requires that CenTra be afforded an opportunity to conduct discovery and to present evidence concerning the misconduct of the Board attorneys at a hearing. This point is particularly significant in light of the fact that the parties in the *Shaffer* decision had recourse to the broad

---

[8]As in *Shaffer*, it is impossible to discern what effect the presence of Garavaglia's perjured testimony and resulting absence of evidence elicited on cross-examination had on the ALJ's decision regarding joint employer status. Therefore, the Board's contention that other evidence before the ALJ would have led him to the same conclusion, regardless of his lack of knowledge concerning Garavaglia's role with D&S, must be rejected.

and extensive discovery permitted under the Federal Rules of Civil Procedure.[9] By contrast, proceedings before the Board provide for exceedingly limited discovery, to which no response is permitted until immediately prior to the proceedings before the Board.

Given the eleventh hour admission by the Solicitor General that there were, in fact, communications between Garavaglia and Government Attorney Lund, and the perjured testimony of Garavaglia thereby revealed, remand for an evidentiary hearing to determine the role of Garavaglia in engineering the D&S/CenTra contractual relationship is required. To hold otherwise would necessarily require this Court to construe the decision of the Sixth Circuit in *Demjanjuk* in a manner which conflicts with the Fourth Circuit's decision in *Shaffer*. Such a conflict should be resolved by this Court.[10]

CONCLUSION

The Board should not be allowed to act without regard to applicable canons of professional responsibility, to create a one-sided record, to seek victory over truth and then, only after the record below is closed, admit to clandestine contacts with the labor representative of CenTra. The Board should not have had the opportunity to discuss and influence Garavaglia's testimony prior to the Board's hearing without CenTra's knowledge and consent.

---

[9]Pursuant to the Board rules established by the General Counsel under Section 3(d) of the Act, the Federal Rules of Civil Procedure concerning discovery are not applicable to Board proceedings. *See* NLRB General Counsel Rule 10352.1.

Accordingly, CenTra submits that, in view of the perjured testimony of Garavaglia, it was impossible to assess the credibility of his testimony concerning his role at D&S when he was Vice President Labor Relations for CenTra. This evidence was not discoverable given the Board discovery procedures, and thus was not adduced before the ALJ.

[10]In the alternative, should the Court find that all government attorneys are held to a duty of candor which does not permit tolerance for perjured testimony, then an issue of national scope and importance regarding the standards of conduct applied to government attorneys is presented which justifies granting a writ of certiorari.

Neither the ALJ, the Court of Appeals nor even CenTra, however, had proof of the Board's impermissible contact until the Solicitor General's admissions in its Brief in Opposition. CenTra should be given the opportunity to have the fact finder determine any alleged liability under rules of procedure applicable to all litigants. This matter should be remanded to the fact finder to reopen the record to consider these additional factors.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

Patrick A. Moran*
Eric A. Parzianello
Scott T. Stirling

EVANS & LUPTAK, P.L.C.
2500 Buhl Building
535 Griswold Street
Detroit, Michigan 48226
Telephone (313) 963-9625
Attorneys for Petitioners

* Counsel of Record